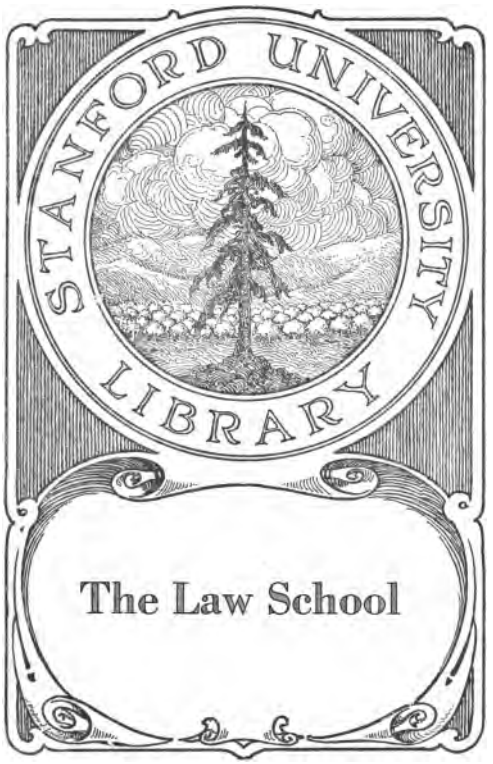
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JOS. H. MAUPIN,

ATTORNEY GENERAL.

A. J. Baltzmin

REPORT

PRESENTED BY W. C. Ferrell

OF THE

ATTORNEY GENERAL

OF THE

STATE OF COLORADO,

FOR THE

YEARS 1891 AND 1892.

JOSEPH H. MAUPIN,
ATTORNEY GENERAL.

COLORADO SPRINGS, COLO.
THE GAZETTE PRINTING COMPANY, STATE PRINTERS.
1892.

REPORT

OF THE

ATTORNEY GENERAL OF COLORADO.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., November 29, 1892.

To His Excellency, JOHN L. ROUTT,
Governor of Colorado.

SIR—I beg leave, respectfully, to submit the following report, pursuant to law requiring the incumbent of this office to report to the Governor biennially:

1. The rapid growth and material development of this State, the consequently necessary increase, from time to time, of the number of district and other subordinate courts, the creation by the last General Assembly of an additional appellate court to facilitate the disposition of the multiplying causes for review by appellate jurisdiction, are facts which forcibly suggest the increasing importance and onerous character of the duties pertaining to this office.

2. In addition to the duties named, numerous equally important responsibilities are imposed upon the Attorney General, as a member of different boards which are created by the Constitution and statutes, of which the principal are, the State Board of Land Commissioners, the State Board of Equalization, and the State Board of Education. The Constitution vests in the first-named board the sole power to control and dispose of the public lands, and the beneficent purposes for which they were granted to the State, the sacred trust impressed upon them by the terms of both the grant and our State Constitution, requiring that the merits of each of the numerous applications for lease and sale of said lands should be considered and determined, are some of the serious considerations which claim the attention of every conscientious member of said

board. The mere mention of the Board of Equalization, which has for its purpose the adjustment of the burdens of taxation, in order that they may be equally borne by all citizens, and that the State government may obtain its necessary revenue, is sufficient to suggest the importance of the duties and magnitude of the responsibilities to be performed and discharged by its members. Your Excellency, as a member with me of each of said boards, is familiar with the exacting nature of the work required of them, and you are sensible of the extent to which all of the people of the State are concerned in its intelligent and faithful performance. It has been unavoidably necessary to devote so much of my time to official duties of this character and other matters, a part of which are hereinafter mentioned, that I have been compelled to leave almost entirely the work of the character first named—the attendance upon the courts and management of State litigation—to my able assistant, Mr. Henry B. Babb, who, I am glad to say, has, in the performance of such duties, uniformly protected and advanced the interests of the people with unexcelled promptness and efficiency. During my entire term of office it has been unnecessary to expend any money in the employment of special counsel in State cases of unusual difficulty and importance, and no part of the appropriation to meet such exigencies, which is under the control of the Governor, has been expended for this purpose.

3. The State litigation mentioned embraces:

First—The preparation for the appellate courts, by briefs and the argument of cases in which the State is interested, which are brought for review from the lower courts, and suits which are originally brought in said appellate courts.

Second—Cases in the district courts to which some State officer is a party and requests the assistance of the Attorney General, or in which the Governor directs the Attorney General to represent the State.

Third—Cases in the United States courts and land offices, in which the title or claim of the State to public lands is involved.

4. Pressing duties which were deemed to be of greater importance to the people have prevented this office from appearing in many of the cases of the class last mentioned, and the official integrity of those whom the United States

government has appointed to adjudicate such cases has, at times, been the sole protection of the State in the matters in controversy. The greater part of such cases, however, have been those in which the proceedings were chiefly formal in character, and in which the protests of the State, stating the defenses to the applications, respectively, were sufficient to secure a reasonably fair trial. Some of the cases of the class last mentioned, as will appear later on, are of the utmost importance to the State; and in such, the interests of the State have been vigilantly defended.

5. Some idea of other duties of the office is suggested by official opinions, which are hereinafter published, in addition to the two hundred letters, more or less of the same advisory character, which have been written to county and other officers, and many hundreds of letters to other persons. The law prescribing the duties of the office does not require the Attorney General to advise county officials and other persons than the State officials specified in said law; and perhaps a better practice would be to decline to answer inquiries from other persons than those specified, but it is frequently as easy to yield to the inclination to oblige the person seeking information as it is to refuse.

6. In addition to the foregoing, there have been, during my term of office, eighty-eight requisitions from the Governor of this State upon the Governors of other States and Territories, for the extradition of fugitives from justice of this State, and seventy-seven requisitions upon the Governor of this State from the Governors of other States and Territories for the extradition of fugitives, from their respective jurisdictions, found in this State. All papers of this character are referred to the Attorney General, who decides as to their formal sufficiency before the Governor grants or refuses the process requested. It has been, during my administration, and I think for a number of years, the practice of this office to conform to the rules adopted by the Inter-State Extradition Conference, which met in New York city in 1887. The occasion for procuring the extradition, from another State, of escaped criminals, is somewhat infrequent in many parts of the State, and it is not surprising that district attorneys, and sometimes other persons who act without authority, should be unfamiliar with such proceeding, and should not, in case of emergency, at once know what text books to consult for proper legal direction. This has been the cause of great inconvenience

and delay in some cases, and I think it would be well if the General Assembly would make the rules above mentioned statute law, so that in any case information as to the correct proceeding would be easily accessible.

7. I believe that this brief statement of the duties of the office is sufficient to suggest to the General Assembly that such appropriation should be made for my successor in office as will enable him to employ one or more assistants, having the highest order of legal ability.

8. The following are some of the most important cases which have been tried or heard in the appellate courts, or are pending for trial or final hearing, with a brief statement of the nature of each one mentioned:

The case of Carlile *vs.* Henderson was an amicable suit by the State Treasurer against the State Auditor, to test the power of the General Assembly to increase the salary of the former during his term of office. The statute upon which the action was based, increased the amount of his official bond from $300,000 to $1,000,000, and increased the salary from $3,000 to $6,000 per annum. This act went into effect upon the day which, by law, he should qualify, and he gave the increased bond. Acting upon advice from this office, the Auditor refused to pay the increased salary; and the Supreme Court, in the case of Carlile *vs.* Henderson, recently decided, has construed the law the same way.

The Greenwood Cemetery Land Company *vs.* John L. Routt *et al.*, and S. H. Baker *vs. Id.*, are suits involving the controversy, already familiar to the public, relating to the sale of certain school lands, near the city of Denver, generally known as the "Argo" lands. The first case was tried on its merits, in the District Court of Arapahoe county, last June, and judgment rendered for the plaintiff, from which an appeal was taken by defendants to the Supreme Court, where it is now pending and will soon be decided.

The principal objection to the sale relied on by the defendants, who are the members of the present Land Board, is that the former board attempted to delegate all the power vested in it by statutes, relating to advertisement and sale, to the register of the board, no member of said board being present at such sale, nor in any other way giving it attention. From this abandonment of its trust by the the board, it is contended that all other irregularities complained of resulted; and I believe that no more

important civil case was ever tried in this State, inasmuch as it involves principles which affect all educational interests of the State, depending upon the proceeds of school lands, for all time to come.

M. V. B. Wason *vs.* the same defendants (the Land Board), was a proceeding to enjoin the sale of school lands in Creede, which had been platted by the board and advertised for sale. The principal question was as to the power of the board to declare a lease forfeited for breaches of covenant by the lessees, which, by the terms of the lease, worked a forfeiture, there being no power to make such contract expressly vested in the board by statute. The District Court of Montrose county gave judgment for the defendants, and suit was not further prosecuted.

In re Cummins, Application for writ of *habeas corpus*, was brought originally in the Supreme Court. The decision in this case fixed, for the first time in this State, the important principle in criminal law that the fact that the prosecuting witness was *particeps criminis* with the accused is no defense to a prosecution for obtaining money under false pretenses.

The case of The Collier & Cleaveland Lithographing Company *vs.* John M. Henderson, Auditor, is important, in that the law established by its final determination denies the power of the General Assembly to authorize the expenditure of any public money for any purpose, except legislative uses, in any other way than by bill regularly passed and submitted to the Governor for his approval or veto. The plaintiffs in this case sought to compel the Auditor to issue his warrant for the printing of the State Engineer's report, which had been done according to a supposed contract with the Secretary of State, made pursuant to a concurrent resolution of both houses of the General Assembly, directing the printing of a larger number of said reports, with a larger number of pages, than was provided for by the statute, such excess number being "for distribution among the people." The Court of Appeals sustained the position taken by the Auditor and this office, holding that said resolution was not law enacted in the formula and manner prescribed by the Constitution, that it was therefore void, and no valid contract could be made upon its authority. The saving to the State, by thus restricting the frequently too inconsiderate action of the Legislature in directing expenditures, can be best estimated by those who are familiar with accounts against the

State, created by previous Legislatures in the same manner.

N. S. Hurd *vs.* J. N. Carlile, Treasurer, was a suit brought by the deputy superintendent of insurance to have decided several questions in controversy between the Treasurer and the insurance department. The action was upon a supposed claim against the State, created by two journeys by the plaintiff—one to attend a convention of insurance commissioners in the City of St. Louis, Mo., the other to investigate, under appointment of the Superintendent of Insurance, the affairs of an insurance company of Knoxville, Tenn., doing business in this State. The defenses interposed by the defendant were that the insurance law did not vest the plaintiff with power to do any official act outside the State, and that there was no appropriation by the Eighth General Assembly for the insurance department. The first position is sustained by the recent decision of the case by the Court of Appeals; the court, for reasons stated in said decision, declining to decide the second question. This case, and the recent decision by the Supreme Court of the case of The Institute for the Mute and Blind *vs.* Henderson, Auditor, establish the important principle that the constitutional prohibition that "no money shall be paid out of the treasury except upon appropriation made by law, and on warrant by the proper officer in pursuance thereof," cannot, in any case, be evaded by the Legislature by the enactment of general statutes. The influence these cases will have on the future financial affairs of the State is apparent, without comment, to every intelligent citizen.

The case which involves the largest amount of all cases to which the State is or has been a party during the present admininistration, was commenced by Benjamin M. Frees *et al.*, by application under United States statutes relating to coal lands, in the United States Land Office, Pueblo District, and involves the State's title to section 36, township 31 south, range 65 west. It is hardly necessary to mention that this section is claimed by the State, under the grant by the general government of sections 16 and 36, for school purposes. The State, in part by its lessees, has been in possession of this land for a number of years, and for several years has leased part of it to The Colorado Coal and Iron Company. Some idea of the value of the land is suggested by the fact that since the said lessee has had its plant complete and in operation, it has paid the State a

royalty averaging not less than $1,000 per month. The plant of this lessee has cost not less than $60,000. The State, in its protest, pleaded, among other things, that the main issue was *res adjudicata*, that the same had been found against the government in a former case of Delos A. Chappell *et al. vs.* The State of Colorado. This question was argued at length before the Register and Receiver of the Pueblo office, in November, 1891, and in due time they decided in favor of the State and against the contestants. The latter appealed to the commissioner, at Washington, D. C., and he, in the month of August, 1892, reversed the first-named decision and ordered a hearing. Application, in due time, was made for appeal to the Secretary of the Interior, which has been recently denied. The further steps will be taken after consultation with my successor in office, upon whom will rest the responsibility of conducting it, for the State, to final issue.

Another case of great importance, and of similar character, is The Colorado Alabaster Company *vs.* The State, etc., recently filed in the Pueblo office, and involves the title to the north half of southeast quarter, and east half of northeast quarter of southwest quarter, section sixteen, township one hundred and eighty, range sixty-nine west. The issue is, whether or not the land was known, at the time of the admission of the State, to contain the large and valuable deposits of alabaster which now make it desirable to contestants. This case is set for hearing, in the district office, December 22, 1892.

9. I have thus given a brief *resume* of cases which, except the two last named, are important, because the questions determined therein are new in this State and will have a far-reaching effect on the policies of the several departments respectively concerned. Numerous other cases, without these features, or which have been brought to our appellate courts from trial courts, for review, are omitted. Of the class last mentioned, are all criminal cases in which it is the duty of the Attorney General to represent the people in the appellate courts. It has thus been the duty of this office, during my administration, to appear in a number of important cases, the most celebrated of which is T. Thatcher Graves *vs.* The People, soon to be argued and submitted. All such cases, however, will be reported in the published decisions of our appellate courts, and an account of them here would needlessly extend this statement.

10. I have given this general, rather than a more accurate tabulated statement of the work done during my term of office, for the reason that this form will be of more interest and convey more information to the general public than the other, and for the additional reason that a tabulated statement would have but little statistical value, because of its incompleteness. There seems to be no method prescribed by law for collecting and preserving statistics relating to crimes and criminal trials. The value of such statistics can hardly be overestimated; and it appears to be especially pertinent to here suggest that a very simple method, adopted by some other States, is to make it the duty of the prosecuting, or district attorneys, to report to the Attorney General, briefly, in tabulated form, the work of this character done under their supervision. These statements, when incorporated in the Attorney General's report, are in quite a convenient and permanent form for preservation.

11. I feel that it is hardly proper to conclude this statement without some words of commendation relating to my assistant, Mr. Babb, whose intelligent aid, in all matters relating to the office, has relieved me of much care; and to Miss Katharine Grace, my stenographer and clerk, whose skillful and willing services have contributed much to making easy the performance of my official duties; nor can I conclude without expressing to your Excellency my warm appreciation of the cordial relations which have existed between us throughout this administration, and of the courteous treatment of all the State officials, in duties concerning their respective departments.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

OPINIONS OF THE ATTORNEY GENERAL.

No particular form is necessary to a valid assignment of a claim against the State; though an office regulation that such transfers be by formal endorsement, is suggested.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, January 24, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—You have submitted for my consideration certain questions as to blank endorsements across the back and face of bills presented to you, either of which endorsements is intended to be a valid assignment of the claim covered by the bill; and you desire to know whether you can issue a warrant to the bearer of the bill, endorsed in either of the above ways; and if not, what form of assignment you shall require.

There can be no doubt as to the right of the holder of the bill, or claim against the State, to make a valid assignment thereof, nor that the assignee is entitled to have a warrant for the amount issued directly to him. No particular form of assignment is required, nor does it make any difference whether the endorsement is on the face or back of the bill. I would respectfully suggest, however, that you have parties bringing you bills endorsed in blank, fill in the blank with the name of the assignee.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The fiscal year, under the existing law of this State, commences December 1st and ends November 30th of the year following.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 3, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—I have your communication of the 31st ult., submitting this question: "When did the fiscal year of

1890 begin? When did it, or when will it, end?" In reply to your inquiry, I beg leave to say that Section 1 of Article X., of the Constitution provides that "the fiscal year shall commence on the first day of October in each year, unless otherwise provided by law." The First General Assembly of the State convened November 1, 1876, and enacted the present law, which provides that "the fiscal year shall be deemed to commence on the 1st day of December and end on the 30th day of November in each year." This law was approved February 27, 1877, and, by the Constitution, there being no emergency clause, took effect ninety days thereafter. I am of the opinion, therefore, that the first fiscal year under this law commenced December 1, 1877, and ended November 30, 1878, and was, or should have been, known as the fiscal year of 1878. To call it the fiscal year of 1877 would be to make it include a period of time of about six months prior to the time of the taking effect of the law. It follows from this, that the fiscal year commencing December 1, 1878, and ending November 30, 1879, was the fiscal year of 1879, and so on, including eleven months of the calendar year next following, and taking the name of that year.

It seems to me clear, that the only answer to be given to your question is, and it is my opinion, that the fiscal year of 1890 began December 1, 1889, and ended November 30, 1890, and that we are now in the fiscal year of 1891, it having commenced on the 1st day of last December and will end on the 30th day of next November.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. The Constitution of this State prohibits an increase in the salary of any officer during his term of office, or after his election for such term.

2. The statute of 1891, therefore, which increases the State Treasurer's salary from $3,000 to $6,000, is not applicable for the benefit of the incumbent of the office for the term commencing the same year.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 7, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—I have from you a certified copy of "An act in relation to the State Treasurer," approved January 13,

1891, with the request that I inform you whether the provisions thereof, in regard to salary, apply to Hon. James N. Carlile, State Treasurer.

The law in force at the date of the approval of this act allowed the State Treasurer an annual salary of three thousand dollars. Section 4 of the act in question provides that the State Treasurer shall receive a salary of six thousand dollars per annum. The act contains an emergency clause, and hence took effect immediately upon its approval by the Governor, which was on the 13th day of January, the very day upon which Mr. Carlile's term of office commenced. In order to ascertain which of these laws apply to him, it will be necessary to look for light to the provisions of the Constitution.

Section 30 of Article V. of that instrument, as amended November 7, 1882, reads as follows: "Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment." Section 19 of Article IV. seems more liberal as regards the increasing or diminishing of the salaries of the executive officers. It provides that the State Treasurer and other officers of the executive department "shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms." Applying this latter section to the State Treasurer, it only remains to determine when his official term commenced.

The word "term," when used in reference to the tenure of office, means a fixed and definite time; and by referring to Section 1 of Article IV., it will be seen that the date at which the terms of the executive officers shall begin is clearly fixed and certain. It is as follows: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold his office for the term of two years, beginning on the second Tuesday of January next after his election."

The term of office, then, of the State Treasurer, beginning, as it does, on that day, must necessarily end with the close of the Monday immediately preceding the second Tuesday. It clearly being the purpose of the law that there should be no interim between the ending and begin-

ning of the term of an executive officer, I am satisfied that the old term ended with Monday and that the new term commenced with Tuesday, and that Mr. Carlile would have been entitled to demand the office at the very earliest moment on that day. He was not compelled to do so, of course; in fact, he may not have taken the office or qualified on that day, but his term, nevertheless, commenced from that time.

Taking this view of the law, and considering that the act in relation to the State Treasurer, which you submit to me, was approved on January 13th (the day Mr. Carlile's term of office began), it necessarily follows that it was approved and took effect *during* Mr. Carlile's official term, and hence cannot apply to him.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

N. B.—The foregoing construction of law is sustained by the Supreme Court, in the case of Carlile *vs.* Henderson, 17 Colorado.

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1. The statute does not require that warrants against the treasury shall state upon their face the year's revenue from which they are to be paid.

2. Credit should be given county treasurers for moneys paid out by them during the current year, from the revenues of 1889 and prior years, on premiums earned under statutes in force during said years.

3. The State Treasurer should receive loco certificates issued during 1881 from county treasurers for general revenues collected for subsequent years.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 13, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—In your letter of recent date, you desire my opinion upon several questions therein submitted, which I will answer in the order in which you have stated them.

First—Should a warrant issued by the Auditor on the Treasurer, to be paid out of general revenue not yet col-

lected, state on its face the year's revenue out of which it should be paid?

It is provided in Section 1379 of the General Statutes, that in all cases where the Auditor is authorized to draw a warrant on the Treasurer, it shall be drawn "in the form required by law." Section 1399 prescribes the exact form of the warrant, and provides that all warrants drawn by the Auditor on the Treasurer of State shall be in accordance with the form there given. By referring to this form, it will be seen that no direction is given as to any particular year's revenue out of which it is to be paid. The law makes it mandatory upon the Auditor to express, in the body of any warrant which he may draw upon the treasury for money, the particular fund appropriated by law out of which the sum is to be paid; and while, doubtless, it would be much better for the warrants issued by the Auditor, to be paid out of the general revenue not yet collected, to also state upon their face the year's revenue out of which they should be paid, yet there is no such requirement in the law; and I am of the opinion, therefore, that it need not necessarily be stated.

Second—When a county treasurer collects general revenue for 1889 and prior years, and pays the same out on bounty and premiums during the present year, can I lawfully give them proper credit for the same?

The first law authorizing the payment of premiums and bounties, enacted after the adoption of the Constitution, was approved March 15, 1877. It provided for a premium of 25 cents for each hawk killed within the State, which premium was to be paid by the county treasurer, upon presentation of the head of the hawk; and the amount so paid by the county treasurer was to be credited to him by the State Treasurer, upon proper showing as to the killing, etc. Similar laws were enacted in 1879 and 1881, offering a premium for the killing of wolves, coyotes, and mountain lions, said premium to be paid for in like manner by the county treasurers, and the amount so paid by them to be credited to them by the State Treasurer. In 1885, all these laws were repealed; but in the repealing acts (with the exception of the one relating to hawk heads) there were provisos that nothing therein contained should affect the validity of any certificate, or other evidence of indebted-

ness then outstanding, issued in accordance with the provisions of the laws thereby repealed. A new law was enacted in 1889 (see Session Laws 1889, p. 35), providing a premium for the killing of wolves, coyotes, bears and mountain lions, and authorizing the county treasurer of the county in which said animal was killed to pay said bounties, upon sufficient proof that the animal was killed, and providing that the amount so paid by him should be credited to him by the State Treasurer. This law is still in effect.

These laws, unquestionably, have proven a great drain upon the public treasury; and the amounts that have been and are continually being paid out for bounties are so large that your predecessor in office felt constrained to call the Governor's attention to the matter, and to urge the repeal of all bounty laws. Until repealed, however, there remains nothing for the county treasurers to do but to pay the premiums. When, therefore, they collect the revenues for the years named, and pay the same out on bounties and premiums during the present year, it is your duty under the law to give them proper credit for it, upon proper showing as to the amount paid out by them.

Third—Can I receive loco certificates, issued during 1881, from county treasurers for general revenues collected for subsequent years?

The act concerning loco weed was approved March 14, 1881. It provided a premium for each pound of the weed dug up; that the county clerk should weigh and destroy the weed, and give to the person entitled thereto a certificate, showing the number of pounds and the amount to be paid therefor, etc.; that this certificate should be received, and the amount so certified paid to the holder, on presentation to the collector of the revenue of the county in which the same was given, and such collector should be allowed payment out of the State treasury for the same.

On February 18, 1885, this law was repealed; but the right and duty to pay such certificates was preserved by the repealing law. I can, therefore, see no sufficient reason in law why certificates issued in 1881 should not be received by you from county treasurers for general revenue collected for subsequent years.

In your fourth question, you desire to know whether the law allowing the county treasurers to pay bounties and premiums out of the general revenue of the State is con-

stitutional; and if unconstitutional, whether it will affect you in receiving the treasurers' bounty affidavits as such.

In answer to this question, I desire to say that a question as to the validity or constitutionality of a statute is one of much delicacy; and where much doubt exists on the subject, the uniform practice of the courts is to sustain the law. The power to hold a statute unconstitutional, the authorities all agree, should be exercised with the utmost care, and only in the clearest cases. The reason courts are so reluctant to declare statutes unconstitutional, is because of the higher power they assert in doing so, and because of the respect which is due to one of the co-ordinate departments of the government.

In passing upon these questions, the Attorney General should show even greater sensibility and more caution than the courts, and should never declare a statute void unless it is clearly manifest to his judgment, beyond question or doubt. Now, concerning the law referred to, I am not at all clear as to its unconstitutionality; and until it is pronounced to be such by the courts, it is your duty to comply with it.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

N. B.—The question as to the constitutionality of the bounty laws was recently presented to the Supreme Court, in the case of the Institute for the Mute and Blind *vs.* Henderson, Auditor, and was decided unconstitutional.

One legislative body cannot bind a subsequent one; and every legislative body, except in cases in which its power is limited by the Constitution, may modify or abolish the acts of its predecessors.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 24, 1891.

HON. HENRI R. FOSTER,
President Board of Trustees,
School for the Mute and Blind of Colorado.

DEAR SIR—In your letter of the 17th inst., you direct my attention to your report for the biennial term ending November 30, 1890, at pages 10 and 11 thereof, under the heading "Complaint," and request my opinion upon the statement of facts contained therein.

It appears from your statement, that Clear Creek county had incurred an expense of $2,697.59 for taking care of and supporting, for the period of eight years previous to his being admitted to your institution, a blind boy, who was a county charge upon said county; that the Seventh General Assembly, desiring to reimburse said county for the amount so expended by it, passed an act appropriating the amount thereof from the fund previously set apart by legislative enactment for the support and maintenance of the Mute and Blind Institute; that the Auditor of State refused to issue his warrant against the revenue named, whereupon the county sued out a writ of mandamus in the District Court of Arapahoe county, directing him to issue his warrant; and upon hearing, it was adjudged that the warrant should issue, to be paid from the fund named. You ask that the board be empowered to enter and prosecute a suit against Clear Creek county, compelling it to replace in the State treasury, to the credit of the funds of the institution you represent, the sum of money appropriated and taken therefrom in the manner stated; and it is upon the question as to whether or not such suit can be maintained, under the circumstances, that you desire my opinion.

I shall be very brief in giving my reasons for holding that such suit should not be brought. The rule is, that one Legislature cannot by its enactments bind a subsequent one. Every legislative body, unless restricted by the Constitution, may modify or abolish the acts of its predecessors. Judge Cooley, in his Constitutional Limitations, says: "There can be no vested right in the existing general laws of the State which can preclude their amendment or repeal." The First General Assembly passed an act to create an institute for the education of the mute and blind, and provided a fund for its support and maintenance. This fund remained intact, except for the purpose specified in the act, until the Seventh General Assembly, by an act approved April 22, 1889, appropriated therefrom the said sum of $2,697.59, and thus depreciated the fund to that extent. The validity of this appropriation was passed upon by the District Court of Arapahoe county, in the case of Clear Creek county *vs.* The Auditor, above mentioned, and it was held that the Legislature had the power to make the appropriation. So far as I am advised, no exception was taken to this judgment and no appeal taken therefrom.

Upon careful consideration of the whole question, I am convinced that the decision of the court, under the law, is right, and that the reasons going to sustain such decision are conclusive; and hence it would, in my opinion, prove fruitless and unwise to now institute proceedings to recover the money paid by the Auditor to Clear Creek county under this decision of the court.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The law relating to fees to be collected from corporations by the Secretary of State, construed.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 25, 1891.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—You call my attention to Section 1 of "An act to fix the fees to be collected by the Secretary of State for incorporation and certain other privileges," approved April 4, 1887, and ask me to construe the same for you, that you may know what fees you shall collect under said section.

In answer, I am of the opinion that you should collect, for the use of the State, of every corporation, joint stock company, or association incorporated by or under any general or special law of this State, or by or under any general or special law of any foreign State or kingdom, or any State or Territory of the United States, beyond the limits of this State, having a capital stock divided into shares, the following fees, to-wit:

First—Where the capital stock, which said corporation, company, or association, is authorized to have, does not exceed $100,000, you should collect a fee of $10.00, and no more.

Second—Where any such corporation, company, or association, is capitalized in the first instance at less than $100,000 and the capital stock thereof is subsequently increased, you should charge ten cents on each thousand of the amount of each subsequent increase, regardless of the arbitrary fee of $10.00 previously collected; and you should make this additional collection, even if the capital stock, as subsequently increased, may not reach $100,000.

Third—Where any such corporation, company, or association, has a capital stock in excess of $100,000, you should collect, in addition to the ten dollar fee, the further sum of ten cents on each and every thousand dollars of such excess.

Fourth—Where any such corporation, company, or association, is capitalized at $100.00, or less, and is, by its charter, authorized to increase its capital stock over and in excess of that amount, you should collect, in addition to the fee of ten dollars, a fee of ten cents on each and every thousand dollars of such excess to the amount that said corporation *is authorized*, by its charter, to capitalize its stock.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

An act of the Legislature appropriating money from the State treasury for the relief of settlers is in conflict with Section 34, Article V. of the State Constitution, which prohibits appropriation for such a purpose, unless the beneficiary of such appropriation is under the "absolute control of the State."

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, March 16, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—In your communication of March 10th, you furnish me with a certified copy of an act passed by the present General Assembly, and approved by the Governor March 3, 1891, and entitled "An act to provide for the assistance of agriculture and the relief of the settlers in certain counties of the State," etc., and request that I give you my opinion—

First—As to the constitutionality of said act, and

Second—If unconstitutional, will you be protected in paying warrants issued thereunder?

Section 1 of the act submitted appropriates, out of any money in the State treasury not otherwise appropriated, the sum of $21,250 for the assistance of agriculture and the relief of settlers in certain counties—eight in number—in eastern Colorado.

Section 2 makes it the duty of the Auditor to draw his warrants on the State Treasurer, in favor of the commissioners of each of said counties, for the amounts appropriated for the relief of the settlers of such counties.

Section 3 confers authority upon the commissioners to use the money appropriated to purchase seeds and grains and distribute the same to all the agriculturists and farmers needing such assistance, within the several counties, for planting in the season of 1891.

The evident purpose of the Legislature in appropriating this money from the public treasury was to relieve these settlers in their distress, and, as far as possible, aid them in continuing the business of farming in the locality where they now are, without which aid many of them, no doubt, will be compelled to abandon their homes and farms and seek a livelihood elsewhere.

If, therefore, it is possible, in any view of the law, to sustain the constitutionality of this enactment, it ought to be sustained.

It has passed the Legislature under all the forms in the Constitution, and has received executive sanction; and unless it is unconstitutional beyond all question, I conceive it to be your duty, and mine, to be governed by it and to enforce it.

The only question, therefore, to be determined by me is as to whether or not this statute is so clearly unconstitutional that, as the statutory legal adviser of the executive officers, it becomes my duty to advise you not to be controlled by it, and to pay out no money under its provisions.

Under the Constitution of this State, the rights and duties of the several departments of the State government are carefully distributed and restricted; and I understand the rule to be, that if any one of them exceeds the limits of its constitutional powers, it acts wholly without authority, and its acts can have no legal force whatever.

By reference to Section 34 of Article V. of the Constitution, we find this language: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State." By not being "under the absolute control of the State," means, of course, as a State institution.

The action of the Legislature in appropriating from the public treasury said sum of money, in the manner and for the purposes specified in the act, is, in my opinion, in direct violation of this section, and hence, under a full conviction of duty, I am constrained to hold that the act is unconstitutional and void.

In answer to your second question, I will advise you that no question in law is better settled than that ministerial officers, and other persons, are liable for acts done under an act of the Legislature which is unconstitutional and void.

Says Mr. Cooley, in his work on Constitutional Limitations: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration, are void; it constitutes a protection to no one who has acted under it."

All persons are presumed to know the law; and if they act under an unconstitutional enactment of the Legislature, they act without authority of law, and do so at their peril, and must take the consequences.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The Attorney General will not, at the solicitation of another State official, answer questions which do not concern the department represented by said official, and propounded by a party who has no interest in the solution of said questions.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, March 17, 1891.

HON. N. B. COY,
Superintendent of Public Instruction.

DEAR SIR—I have from you a letter, lately written to you by the superintendent of schools of Kiowa county, concerning certain questions heretofore submitted to you by him, and by you handed to me, with the request that I give you my opinion thereon.

I, at the time, declined to answer the questions for you; I now again respectfully decline to do so, for the reason that the county superintendent is wholly without authority of law to call upon you for your opinion in matters that do not concern him in the least, nor do they pertain in the

least degree to the duties of his office, and were only asked by him, in all probability, at the request of the board of county commissioners of Kiowa county. The questions propounded by him pertain exclusively to a controversy now pending between the Missouri Pacific Railroad Company and the said board of county commissioners, concerning the validity of certain tax levies, certified to the commissioners, and by the latter carried into the regular levy for 1890.

This is a matter that should be settled among themselves, if possible; and if not, then the courts should decide it for them. At all events, it seems to me eminently proper that you and I, as State officials, should keep out of the fight.

Yours respectfully,

JOS. H. MAUPIN,
Attorney General.

No specific appropriation is required to authorize payment of per diem to members of the Legislature.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, March 24, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—I received from you, on yesterday, certain Senate resolutions, relating to the payment of the per diem of its members, together with your request for my opinion as to whether or not, in the absence of a specific appropriation, you can legally issue warrants therefor.

In answer, permit me to direct your attention to the fact that the late Attorney General, in an opinion given to your immediate predecessor in office, answered affirmatively very much the same questions of law now submitted by you to me. (See Attorney General's report for 1889–90, page 60.)

This opinion is well considered; is based upon sound reasons; is supported by a long list of authorities; and the principles there announced have been very generally accepted by the courts, for years.

As I can conceive of no reason for reversing this opinion, I would respectfully suggest that you follow it, and

draw your warrants in payment of the salaries of said members, whether a specific appropriation has been made therefor or not.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. No person is entitled to receive pay as the employe of either house of the General Assembly who has not been employed pursuant to law, enacted in the manner prescribed by the Constitution.

2. A resolution of either house, providing for "certificates of service" to persons engaged in any other manner, and providing for their payment from the State treasury, is in conflict with Section 27, Article V. of the Constitution, and does not authorize the Auditor to draw his warrant for the amounts named in such certificates.

3. The rights of proper employes to payment are not forfeited by reason of the fact that they were not sworn in before rendering several days' service.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 10, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—I beg leave to acknowledge receipt of your letter, wherein you enclose House Resolution No. 40, and direct my attention to the fact that all the positions enumerated in Section 1579 of the General Statutes, relating to House officers and employés, were filled at the time the persons named in the said resolution were employed, and that they were employed in addition to those named in said section, and were so employed prior to January 31, 1891.

Upon this statement of facts, you ask me to advise you whether or not you can legally issue warrants, in payment of the services rendered by the employés named in said resolution, upon certificates duly issued by the Speaker of the House of Representatives.

The resolution is as follows: "*Resolved*, That the Speaker of this House be and is hereby authorized and instructed to issue certificates of service, setting forth the number of days of service rendered by each of the following-named persons, and the amount of compensation due them, pursuant to the provision of General Section 1582 of the General Statutes of Colorado; that they and each of

them have rendered services, by and under the authority of this House, as clerks, pages and janitors, respectively, as acting employés, with the knowledge and approval of the House."

In advising you as to your duty in the premises, I desire, in the first place, to call your attention to Section 27 of Article V. of the Constitution, which is as follows: "The General Assembly shall prescribe by law the number, duties and compensation of the officers and employés of each house, and no payment shall be made from the State treasury, or be in any way authorized to any person, except to an acting officer or employé elected or appointed in pursuance of law." In pursuance of this section, the Legislature enacted a law, fixing the number and kind of officers and employés of the House of Representatives. This law was in full force and effect at the time of the employment of the various persons named in the resolution, who were all in excess of the number fixed by law.

Under the constitutional requirements above quoted, the House, without the sanction of the Senate and approval of the Governor, could not legally authorize the employment of a single one of the persons named in the resolution. It has been held by our own Supreme Court, that the law referred to, fixing the number, duties and compensation of officers and employés, cannot legally be ignored for resolutions separately adopted by either the House or Senate, and that a resolution adopted by either branch of the Legislature does not comply with the constitutional requirements. (The People *ex rel. vs.* Spruance, 8 Colo., p. 314.)

The language of the Constitution is: "That the General Assembly shall prescribe by law the number," etc., "of the officers and employés of each house," and not that each house may, by separate resolution, prescribe the number of its employés, etc. To enact a law, or to amend a law, it is necessary that the Senate and House concur, after which the bill or resolution concurred in shall be submitted to the Governor for his approval or disapproval, and without these prerequisites, no law can be enacted. The House not having the power to employ, the claims of the persons named are consequently illegal, no matter how or by whom they may be certified; and it is your duty to refuse to audit such claims.

On January 31, 1891, a law was enacted repealing Section 1579, referred to above, and fixing the number of officers and employés of the House. Under this law, you inform me, a number of the persons named in the resolution continued in the service of the House for several days before being sworn in as officers, etc.; and you desire to know if you shall audit their claims from the date of the approval of the act, or from the date that they were sworn in.

I will say, that if you are furnished with proper certificates of service, you should audit the claims from the date of the passage of the act, even though they were not sworn in until afterwards.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

It is the duty of the Secretary of State to provide apartments for the Bureau of Horticulture.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 13, 1891.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—A few days ago you requested me to advise you as to whether or not it was your right and duty to provide, at the expense of the State, necessary apartments for the Bureau of Horticulture.

Upon examination, I find nothing, in the act creating this bureau, requiring you to provide it with office rooms and furniture. Usually, acts creating separate bureaus contain provisions that the Secretary of State shall provide them with suitable offices and all necessary appurtenances to said offices. While this provision is omitted from the act creating the Bureau of Horticulture, I am, nevertheless, of the opinion that it is your duty to provide said bureau with the necessary office room. It is a department of the State government, made so by law, and has been recognized as such by our Supreme Court, and it is among your duties to provide all such departments of the State with suitable apartments, and supply them with such furniture and other articles as may be required.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

Acceptance of payment by, and issue of patent to, the purchasers of the school lands known as the "Argo" land, should be refused until the State Board of Land Commissioners, or the courts, have decided that there was no fraud nor fatal irregularity in the sale.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 22, 1891.

HON. MATT. FRANCE,
Register State Board of Land Commissioners.

DEAR SIR—On yesterday, you informed me that the assignee of the purchaser of the northwest quarter of section 16, township 3 south, of range 68 west, being a portion of what is commonly known as the Argo tract, had requested you to make a deed for the lands above described, to be delivered upon payment of the balance of the purchase price, with accrued interest due on said land, and that said assignee now desired to make said payment, you ask my advice in the premises.

The request is made, I presume, under the law lately passed by the Legislature, and approved by the Governor April 1, 1891, authorizing deeds to be given to purchasers of State lands upon full payment, with accrued interest.

Whether or not the purchasers of the land in question, or their assignee, are entitled to avail themselves of the provisions of the act referred to, it is unnecessary now to determine; it is only necessary to say, that by reason of the circumstances surrounding this particular sale, and the serious charges of fraud made with reference to it, I am strongly of the opinion that no deed should be given to any part of the so-called Argo tract—at least not until the Board of Land Commissioners have had an opportunity to fully examine into all the facts surrounding this transaction, or until its validity shall be passed upon by the courts.

I respectfully suggest, therefore, that you refuse to accept the money or execute the deed.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. Warrants issued in payment of the employes of the Seventh General Assembly, who were in excess of the number of officers and employes fixed by law, are illegal, and cannot be legalized by act of the General Assembly.

2. An act directing the Treasurer to call in and pay said warrants gives him no authority to do so.

3. When the district court has adjudged a warrant to be illegal and void, and no appeal has been taken, the Legislature cannot breathe life into them.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 27, 1891.

HON. JOHN L. ROUTT,
Governor.

DEAR SIR—I have had under consideration Senate bill No. 171, entitled "An act concerning the redemption of certain outstanding State warrants."

The first section provides "that the State Treasurer be and he is hereby authorized, directed, and required to call in and pay, from the funds in his hands appropriated to the purpose, the State warrants drawn by the State Auditor upon the State treasury, which warrants are enumerated as follows." Upon examination, I find that many of the warrants enumerated were issued in payment of employés of the Seventh General Assembly, and that said employés were, at the time of their employment, in excess of the number of officers and employés fixed by law.

Warrants issued to such employés would, in my opinion, be illegal; and if so, they cannot be legalized by the act in question. These warrants, numbering from 20,868 to 21,873, inclusive, were all issued for such purposes. Warrants numbered 22,025 and 22,026, and several others among those enumerated in the bill, were issued to Collier & Cleaveland, for State printing, and were alleged to be illegal and fraudulently issued; and by reason of their questionable validity, my predecessor in office advised State Treasurer Brisbane that they should not be paid, except payment was compelled by the courts. Payment was accordingly refused, and suit was brought by the legal holders of warrant No. 22,025 against the State Treasurer, in the District Court of Arapahoe county, where judgment was rendered in favor of the State Treasurer and against the validity of the warrants. So far as I am advised, no appeal or writ of error has ever been taken from this judgment.

The other warrants enumerated in the bill were also claimed to be illegally or fraudulently issued, and for this reason their payment was refused.

The evident purpose of Senate bill No. 171 is to breathe new life into all these warrants that have heretofore been generally believed to be illegal, some of them, as above stated, having been so held by the courts. It is my opinion that this cannot be done by legislation, and any attempt to do so by the Legislature is usurping the power of the courts. If these warrants are illegal, no act of the Legislature can make them valid; if they are legal, then they should be paid without additional legislation, and the courts will so direct.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. Companies of the National Guard, when serving under the orders of the Governor, sheriff, mayor, or judge, to prevent or suppress a riot, or repel an invasion, are entitled to their per diem.

2. But they are not entitled to pay if orders are issued only by the brigadier-general commanding.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 30, 1891.

HON. J. C. KENNEDY,
Adjutant General.

DEAR SIR—In your letter of April 27th, you submit to me this question: "If the Governor or commander-in-chief orders one or more companies of the National Guard to report for duty, are such men or companies entitled to a per diem for such services?"

In answer, I will say that Section 2350 of the General Statutes provides that officers and enlisted men, when serving under the orders of the Governor, or of the sheriff, mayor or judge, to prevent or suppress a riot or insurrection, or to repel or prevent invasion, shall receive pay at the rates fixed in said section. In view of this section, there is no question in my mind but that when the Governor orders one or more companies to report for duty, for any of the purposes specified in said section, the officers or men are entitled to a per diem, as allowed in said section.

Your second question is: "Are such persons or companies entitled to a per diem if such orders are issued by the brigadier-general commanding?"

In the absence of any law authorizing the same, I am of the opinion they are not.

In answer to your third question, I am of the opinion that their pay should be limited to time of actual duty.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

In the absence of any law prescribing what year's revenue legislative expenses shall be paid from, the expenses of the Eighth General Assembly may be divided equally between the two fiscal years.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 30, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—In your letter of recent date, you direct my attention to the fact that the Eighth General Assembly made appropriations to pay the legislative expenses thereof, and ask if one-half of these expenses may be made payable from the revenue of the fiscal year of 1891 and one-half from the revenue of the fiscal year of 1892.

I am not aware of any provision of law requiring the whole amount of these legislative expenses to be paid out of the revenue of either this or the next fiscal year; and in the absence of a law prescribing what year's revenue these appropriations shall be made payable from, I am of the opinion that it would be entirely proper, just and legal that the legislative expenses of the Eighth General Assembly should be divided equally between the two fiscal years.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

H. P. Bennett, State agent, is legally entitled to payment of his claim of 5 per cent. on money collected.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 1, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—I have had under consideration the account of Hiram P. Bennett, State agent, against the State, for services rendered under contract with the State in the collection of $22,129.00 from the United States, on a disputed

claim of this State against the United States, and recently paid into the State treasury.

The said claim grew out of the direct tax apportioned to the Territory of Colorado, under the act of Congress, approved August 6, 1861.

The contract between the said Bennett and the State of Colorado entitles the said Bennett to 5 per cent. on the sum of money collected from the United States, to-wit, 5 per cent. on $22,129.00. The act authorizing the contract is found on page 328 of the Session Laws of 1885, and provides that the compensation to be paid to the State agent shall be paid out of the moneys recovered.

I am of the opinion, from the reading of the contract, and the act upon which it is based, that the claim of the said Bennett, amounting to $1,106.45, should be paid to him upon a warrant drawn by you out of the fund so recently collected and paid into the State treasury, and that no further appropriation is needed to justify you in drawing your warrant therefor.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

Appropriations from the internal improvement fund for the erection of buildings for State institutions, are valid.

ATTORNEY GENERAL'S OFFICE.
DENVER, COLORADO, May 2, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—Replying to your inquiry of recent date, touching the appropriations by the Eighth General Assembly, from the internal improvement fund, for the purpose of erecting buildings for the use of State institutions, and to pay for addition erected to Agricultural College building, I have to say: That in my opinion, the purposes for which the said appropriations were made are within the intendment of the Federal grant, from which said fund is drawn, and that the acts by which said appropriations are made are, therefore, valid.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

1. Appropriations defined.

2. The relative priority of every appropriation is fixed by the time when the act by which it is made takes effect; but this does not apply to appropriations which have priority in express terms, or by constitutional provision.

3. An emergency clause makes an act operative from the time of approval. In the absence of proof of exact time of approval, all acts approved on the same day are approved contemporaneously, and take effect simultaneously.

4. An appropriation which does not designate the year's revenue from which it is to be paid, is not, therefore, void. Such appropriations may be paid equally from the two year's revenue, if by deferring payment of one-half to the second year subsequent appropriations from the first year's revenue can be paid.

5. Appropriations in excess of the revenue of the year, or years, from which they are to be paid, are void.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 6, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—You request my official opinion as to the order of precedence, in payment, to which a list of appropriations made by the Eighth General Assembly, submitted to me by you, are respectively entitled. At the same time, you convey to me the information that "after paying the appropriations for the judicial, legislative and executive departments of the State, there will not be enough of revenue to pay all the other appropriations made by said General Assembly from the general revenue."

A similar request and statement have been presented to me by the Auditor. The list of appropriations submitted, as above stated, may be classified as follows:

First—Appropriations with an emergency clause, in which the year's revenue from which said appropriations are to be paid is designated.

Second—Appropriations with an emergency clause, in which the year's revenue from which said appropriations are to be paid is not designated.

Third—Appropriations without an emergency clause, in which the year's revenue from which said appropriations are to be paid is designated.

Fourth—Appropriations without an emergency clause, and without designation as to the year's revenue from which they are to be paid.

An appropriation, in the sense in which we are considering it, is an act of the General Assembly, by which a specified sum is set apart in the treasury for a specified purpose. Thereafter, no part of such sum can be lawfully applied to the payment of any claim or demand other than such as is named in the act by which said appropriation is made.

The power of the General Assembly and the authority of the State Auditor and Treasurer in the premises, are limited by the following provisions of our State Constitution:

"ARTICLE X.—SEC. 2. The General Assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the State government for each fiscal year."

. . . . . .

"SEC. 16. No appropriation shall be made nor any expenditure authorized by the General Assembly whereby the expenditure of the State during any fiscal year shall exceed the total tax then provided by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in Section 11 of this article, to pay such appropriation within such fiscal year." . . .

From which it appears that, with certain exceptions not necessary to be named here, "every debt and every act authorizing expenditure beyond the total tax raised within the year is unconstitutional, null and void." (Opinion of Hon. S. W. Jones, Attorney General.)

There being an insufficient amount of State revenue derived from taxes levied for the year 1891 and the year 1892 to pay all appropriations made by the Eighth General Assembly, the Auditor and Treasurer are confronted by the grave question, "What appropriations are void or inoperative, and what claims, based thereon, must be paid?"

In the present case, it is a difficult as well as important question; and I do not find any case in which the courts have directly decided the essential points involved.

I think, however, the difficulty will be measurably removed if the following preliminary questions can be properly answered:

First—What fact, affecting an appropriation, or provisions therein contained, constitutes a criterion by which its relative priority can be determined? In other words, what is the effect of the executive approval, and of the date of such approval? And what is the effect of an emergency clause appended thereto?

Second—In what manner, if any, does the omission by an act to designate the year's revenue from which the appropriation thereby made is to be paid, affect its relative priority?

Third—In what manner, if any, does such omission affect the validity of such an act? And if it is not thereby rendered invalid or inoperative, what are the powers and duties of the State Auditor and Treasurer in paying the appropriations thereby made?

In considering the first question, it is well to observe that each of said acts appropriates only "out of any money in the State treasury not otherwise appropriated," so that the relative priority of every appropriation is, therefore, fixed by the time when the act by which it is made takes effect. Of course this statement does not apply to appropriations which have priority by the Constitution, or by statute in express terms. The effect of an emergency clause is to make the act operative from the day of its approval by the executive. Acts which do not contain an emergency clause, by the general rule take effect ninety days after their approval by the Governor. All acts approved on the same day, in the absence of proof of exact time of approval, are approved contemporaneously, and will take effect simultaneously, unless, in this particular, the provisions of said acts differ. 53 Vt., 649; 4 Met. (Ky.), 53; 29 Ark., 99.

I am aware that the solution of the remaining questions is not unattended with difficulty. It has been intimated, by one of my eminent predecessors in office, that an act making an appropriation, without designating the year's revenue from which said appropriation is to be paid, is of doubtful constitutionality; and that such acts must fail from indefiniteness.

I cannot agree with him in such opinion. I think it was the manifest intention of the framers of the Constitu-

tion to limit the sum total of all appropriations to be paid during any fiscal year to the amount of revenue derived from lawful taxation during said year, and applicable for said appropriations, respectively; but I do not think it was their intention to peremptorily direct the General Assembly, in every instance, to incorrigibly prescribe the exact amount from a given year's revenue that should be paid on each of said appropriations. A compliance with such a rule in all cases, would require a precision of information, on the part of the General Assembly, for which the law does not and cannot provide, inasmuch as the results of all contingencies affecting the revenue, and tending to produce disparity of excess or deficit, cannot, at any time, be precisely and absolutely foreseen.

It seems unreasonable that the validity of the acts of that department of the State government which is the most immediate exponent of the will of the people, should be thus imperiled. Even though it is conceded that some direction to the General Assembly to make such designation is within the intendment of the parts of the Constitution above quoted, a neglect on the part of the Legislature, in making a given appropriation, to designate the year's revenue from which it must be paid, would not, in my opinion, warrant you in construing such appropriation to be void, and in refusing, for this reason alone, to pay warrants drawn on said appropriation.

"The question whether a law be void for its repugnancy [to the Constitution] is at all times a question of much delicacy, which ought seldom, if ever, be decided in the affirmative in a doubtful case." (Cooley's Const. Lim., page 216.)

"Every possible intendment will be made in favor of the constitutionality of the act in question, and the courts will only interfere in case of unquestioned violation of the fundamental law." (Sedgwick on Stat. and Const. Law, 409; Sutherland on Statutory Const., Sec. 331.)

"Where there is not in the law an express limitation to the power to do a certain thing, an inference cannot be made or sustained which will defeat the object of the law. Before determining that the Constitution has been plainly and palpably infracted, incautiously or otherwise, by a coordinate branch of the government, the best energies of our minds should be employed in putting such construction upon it, as to uphold it, if possible, and to carry it

into effect." (Sutherland on Stat. Constr., Sec. 331, 10 Ga., 100.)

The appropriations in question should not be held to be inoperative, for indefiniteness, if, by any possible construction, they can be carried into effect. "Such a construction ought to be given as will not suffer the statute to be eluded." (15 Johns., 357.) "A statute should be so construed as to have a reasonable effect, in accordance with the intent of the Legislature." (3 Mass., 523; 7 Mass., 458; 6 Barb., 60.) "Statutes should, if possible, be so construed as to accomplish the end the Legislature had in view, and not so as to defeat it." (32 Ind., 313.) It is a familiar rule, that statutes should be construed together, and should be so construed, if possible, as to carry each into effect.

It is my opinion that a legitimate construction can be given to the acts submitted that will make them all operative, except such as fail by reason of the late date of their taking effect, and the insufficiency of funds remaining to pay the appropriations thereby made. It is obvious that when a statute directs the payment of an appropriation to be made from the revenues of a certain year, such direction is mandatory, and no part of said appropriation can be paid from the revenues of any other year.

If, therefore, by law, certain appropriations are to be paid from the revenues of 1891, and those revenues are exhausted in the payments of other appropriations having priority, no part of the first-named appropriations can be paid from the revenues of 1892.

It is my opinion that appropriations which do not designate the year's revenue from which payment is to be made, are entitled to priority over appropriations in which payment is directed to be made from the revenues of 1891, when the latter acts take effect on a day subsequent to the taking effect of the former, and that undesignated appropriations may, notwithstanding such priority, be paid, unless a different legislative intent is apparent, partly out of the revenues of 1891 and partly out of the revenues of 1892, if, by deferring such part payments, the Auditor and Treasurer will thereby be enabled to pay both appropriations.

Such a method of payment does not leave the fate of any appropriation to the decision of the Auditor or Treasurer, since payment of appropriations designated to be paid from the revenues of the first year must be safely

within such limits as will insure the payment of the deferred part payments of undesignated appropriations having priority from the revenues of the second year. And no right exists to make payment of an appropriation designated for the first year's revenues, if by such payment there will necessarily be such an unpaid remainder of an undesignated appropriation having priority over the former, as cannot be paid from the revenues of the second year applicable to such purpose.

If more is reserved from the first year's revenue than is necessary to insure safety, the unexhausted balance can afterwards be paid on appropriations, according to their priority, for which the payment of the first year's revenues have been designated.

The foregoing construction does not vest in the Auditor and Treasurer any new function. Appropriations for two years' expenses of the executive and judicial departments, and many other appropriations, are frequently made in gross; so that the exercise of discretion in making payments, in order to preserve the priorities to which different appropriations are respectively entitled, is a duty already familiar to both of said officers.

In accordance with the legal authorities above cited, it is my opinion that it is the duty of the Auditor and Treasurer to exercise such discretion in the apportionment of payments of appropriations, in which the year's revenues from which they are to be paid are not designated, and which have priority over other appropriations in which said designation is made, as will secure the fullest effect to the will of the Legislature, expressed by all its said appropriations.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The appropriation considered, in so far as it relates to the Auditor's office, is limited to the amount appropriated for the same purpose in the general appropriation bill.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 18, 1891.

HON. JOHN M. HENDERSON,
State Auditor.

DEAR SIR—Complying with your request of the 1st inst., to advise you whether or not the appropriation in

Section 2 of "An act to provide clerical assistance in the several executive offices in the State, and make appropriations therefor," is available; and if so, from what fund the money is to be drawn—

It is my opinion that the last clause of Section 2 has the effect of limiting the amount appropriated by said bill to the amounts provided for clerical assistance, etc., in your office, by the general appropriation bill; and that you must, therefore, look to the provision made by the general appropriation bill for all funds available for the purpose named in said Section 2.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

It is the duty of the Secretary of State to collect fees prescribed by law, in advance, for official services for which they are charged; and the State is entitled to one dollar for every official attestation by said officer.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 18, 1891.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—You ask my construction of Section 5, Chapter 38, General Statutes of Colorado, 1883, relating to fees to be charged for work done in your office, and particularly the clause requiring that "for each official certificate, one dollar" shall be charged.

The legal definition of the term, "official certificate," is: "It is a writing by which an officer bears testimony that a fact has or has not taken place." (Bouvier's Law Dict., vol. 1, p. 294.)

The section named, further requires that you shall not do any such official work until the fee or sum fixed to be collected therefor shall have been paid.

It is, I think, clearly the purpose of said section to require you to collect, in advance, for all work mentioned therein; and that the State shall be entitled to a fee of one dollar for every official attestation by you of any fact whatsoever, unless such item is included in work for which a charge in full is specified in said section.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The surplus revenue of 1890 may be used to pay warrants of 1891 in the absence of any different legislative direction.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 25, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—By your favor of May 16, 1891, you submit to me the following questions:

First—Does the act passed in the last session of the General Assembly, entitled "An act in relation to the excess and deficiency warrants of the State," refer to the surplus revenues in the treasury at the date of the adoption of the act, or merely to the surplus revenues to accumulate in years subsequent to the adoption of the act?

Second—Whether or not you are authorized to transfer from the surplus revenue of the year 1890 sufficient amounts to make good warrants drawn against the revenue of the year 1891 for indebtedness contracted in the year 1890?

In answer to which, permit me to say that it is my opinion—

First—That the act in question relates wholly to the surplus to accumulate from the revenues of years subsequent to the adoption of the act.

Second—That inasmuch as the revenues of the year 1891 are, as per your former statement, insufficient to pay the warrants mentioned, after the fixed charges and appropriations for said year have been paid, the surplus derived from the revenues of 1890 may be used for the payment of said warrants, in the absence of legislative direction requiring a different application of the funds constituting such surplus, and provided that there is no such direction that the debts, respectively represented by said warrants, are to be paid from revenues of any certain year.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. It is a proper rule of construction, that in cases where the repealing act re-enacts a provision of the old statute in the same words, the effect of this repeal and re-enactment is to continue the uninterrupted operation of the statute repealed.

2. So when provisions of the act repealed are contained in a revising and consolidating act, by which the repeal is made, such provisions have continuous operation.

3. A repealing act does not affect transactions which are passed and closed, and does not change the status of funds already collected under the law repealed.

4. The Treasurer may look to the general law relating to the duties of his office and State institutions for direction as to the disbursement of money collected under the one-fifth mill tax statutes which were repealed by the law of 1891.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 29, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—In your letter of the 18th inst., you submit the following facts and questions:

"The Eighth General Assembly passed an act levying one-sixth of a mill on each dollar, for the support of the Agricultural College; one-sixth of a mill for the support of the Mute and Blind, and one-sixth of a mill for the support of the School of Mines. The act above referred to repeals Sections 1, 2, 3, 4 and 5 of Chapter 2, G. S. 1883, relating to the Agricultural College; Sections 16, 17, 18, 19 and 20 of Chapter 76, relating to Mute and Blind, and Sections 11, 12, 13, 14 and 15 of Chapter 98, relating to School of Mines."

The repealed sections authorized the disbursement of money, but the repealing act makes no provision for the disbursement of funds on hand or to be received, other than the said one-sixth of a mill. The repealing act has an emergency clause, but no saving clause; and you ask me if there is any law for the disbursement of funds now on hand, derived from the one-fifth mill tax assessed and collected under the repealed laws; and if there is no law for such disbursement, whether or not you would be protected in disbursing the same to the respective institutions.

Your last question indicates your extreme reluctance to withhold any part of said funds from the institutions respectively entitled thereto, according to the provisions of said repealed laws; and that you will not do so, if, by any means, such action on your part can be brought within the scope of your official discretion. No doubt, all good citizens join you in your manifest solicitude for the welfare of our State educational institutions, inasmuch as any

considerable curtailment of their resources, at the present time, cannot be regarded otherwise than in the nature of a public calamity. I cannot, however, advise you to act in the premises without warrant of law; though it is entirely consistent with well-established rules that "statutes should be construed in the most beneficial way which their language will permit, to prevent injustice, to favor public convenience, and to oppose all prejudice to public interests." (Suth. Stat. Cons., 324.) Such a rule should unquestionably control the construction of the law applicable to the matter under consideration, and as much latitude should be allowed to its operation as the limitations, named by the author just quoted, and in which all authorities concur, will permit.

The author above cited, in the same paragraph, says:

"The considerations of evil and hardship may properly exert an influence in giving a construction to a statute when the language is ambiguous or uncertain, or doubtful, but not when it is plain and explicit."

If the intention is expressed so plainly as to exclude all controversy, and is not controlled or affected by any provision of the Constitution, it is the law, and courts have no concern with the consequences—their simple duty is to enforce it; and it is no argument to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers. Even when a court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.

Smith *vs.* State, 66 Md., 215;
Bradbury *vs.* Wagenberst, 54 Pa. St., 182;
Woodbury *vs.* Berry, 18 Ohio St., 456.

Courts have, then, no power to set it [the statute] aside, or evade its operation, by forced construction. If it has been improvidently passed, the responsibility is with the Legislature, and not with the courts.

Douglass *vs.* Chosen Freeholders, 38 N. J. L., 214;
Leonard *vs.* Wiseman, 31 Md., 201;
Rohrbacher *vs.* City of Jackson, 51 Miss., 735.

The language of the law last enacted, and mentioned in your letter, is:

"SEC. 4. That general sections numbered 15, 16, 17, 18, 19 and 20, concerning the Agricultural College; and 2444, 2445, 2446, 2447 and 2448, concerning the Mute and Blind Institute; and 3108, 3109, 3110, 3111 and 3112, concerning the State School of Mines, of the General Statutes of the State of Colorado, together with all other acts inconsistent with the provisions of this act, be and the same are hereby repealed."

The language used is plain and free from ambiguity. We must, therefore, content ourselves with an inquiry into the effect of such repeal; and this should be determined by undisputed rules of law.

The general rule is, that when an act of the Legislature is repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it never had existed.

Dwarris on Stat., paragraph 676;
Suth. Stat. Con., paragraph 162.

Rights depending on a statute, and still inchoate and not perfected by final judgment, or reduced to possession, are lost by repeal of the statute.

Suther. on Stat. Con., Sec. 163;
Alabama Med. College *vs.* Muldon, 46 Ala., 603.

The repeal of that part of the law which provides for the assessment and collection of one-fifth of a mill tax for the use and benefit of said institutions, could not change the status of the fund already collected thereunder, or affect the interests of said institutions therein, for the obvious reason, that said transactions being completed, they are within the exception.

Town of Belvidere *vs.* Warren R. R., 34 N. J. L., 193.

That this is not the difficulty, is evinced by your questions. The perplexity is occasioned by the repeal of the sections which, in each of the chapters named, provide respectively that the fund so created shall be used exclusively for the support and maintenance of said institutions, and the accompanying sections, in each chapter, which empower and direct the State Auditor, from time to time, to draw his warrant on the State Treasurer for the funds so created and collected. Hence your question: Whether or not there is any law for the disbursement of said funds to said institutions.

For the purposes of the conclusions hereinafter reached, it is not necessary to explain at length that there are no contractual relations existing between the State and its educational institutions proper, and hence they have no such vested right in the fund created by taxation for their benefit as places it beyond legislative control.

Head *vs.* Curator's State University, 47 Mo., 220;
Alabama Med. College *vs.* Muldon *et al.*, 46 Ala., 603;
Butler *vs.* Palmer, 1 Hill, 324;
Key *vs.* Goodwin, 4 Moore & Payne, 341, 357;
Dale *vs.* Governor, 3 Stewart (Ala.), 387.

If, therefore, we can find no law remaining by which the money aforesaid can be applied to its original purposes, the repeal of the laws under consideration at once destroyed the claim of the several institutions to said money, and the power of the Auditor and Treasurer to make payment thereof; and by General Section 1364, G. S. 1883, it would become the duty of the State Treasurer to carry such fund to the "general fund."

Upon examination of the new law, however, it is not difficult to discover that it is a revision and consolidation of, and intended by the Legislature to be a substitute for, all the provisions in the three chapters above named, which have thereby been repealed, and instead of three sections, one in each of the different chapters, providing that the funds so created shall be applied exclusively for the support of, or erection of buildings for, the three several institutions, we have in the new law the inclusive provision that "the taxes so collected . . . shall be applied exclusively to the support, use and benefit of the same (institutions named), for the payment of salaries and expenses thereof, and the erection and completion of such buildings as shall be determined upon by the several boards of trustees." This is virtually a re-enactment, in one clause of Section 2 of the new law, of all the repealed sections of the same purport. "It is a proper rule of construction, that in cases where the repealing act re-enacts a provision of the old statute in the same words, the effect of this repeal and re-enactment is to continue the uninterrupted operation of the statute repealed."

Fullerton *vs.* Spring *et al.*, 3 Wis., 607.
State *vs.* Wish, 15 Neb., 448;
State *vs.* McCall, 9 Md., 203.

Especially, if by the terms of the repealing act it takes effect immediately.

State *ex rel.* Birdsey *vs.* Baldwin, 54 Conn., 134;
Middletown *vs.* N. J. West Line R. R. Co., 20 N. J. Eq., 269;
Moore *vs.* Township of Kennockee, 75 Mich., 332.

See, also—

Alexander *vs.* City of Big Rapids, 38 N. W. Rep., 227.

"The rule of construction applicable to acts which revise and consolidate another act or acts is, that when the revised and consolidated act re-enacts, in the same words, the provision of the act or acts so revised and consolidated, such revision and consolidation shall be taken to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act."

Sheftels *vs.* Tabert, 46 Wis., 439.

See, also—

Glentz *vs.* The State, 38 *Id.*, 549, 534;
Alexander *vs.* City of Big Rapids, *supra;*
Merkle *vs.* Twp. of Bennington, 35 N. W. Rep., 846.

From which, and from the universally recognized principle that laws are not retrospective in their operation, unless their terms show clearly such a legislative intent (Cooley, Const. Lim., 455), it is easy to conclude that the three institutions above mentioned are entitled, respectively, to the funds in the State treasury originally collected for their benefit, and it only remains to ascertain the authority for and the proper method of disbursement.

The principle last above stated forbids our looking wholly to the provisions of the new law for direction, since they would change both the status of the funds and the duties of the officers relating thereto. Relating to the Agricultural College, there remains unrepealed, of Chapter 2, General Section 53, which directs the State Treasurer and Auditor in the matter of disbursement of the funds belonging to the college. There is no section of equivalent import left unrepealed in either of the other chapters mentioned. However, I do not think such a section absolutely necessary. Under the general power given to the Auditor by the second subdivision of General Section 1374, G. S. 1883, he is required to "draw all warrants upon the treasury for money, except only in cases otherwise provided by law."

His discretion is controlled and his duties prescribed by the general law relating to his office and to the State institutions.

I have cited authorities and assigned reasons for the foregoing conclusions to an extent that would have been wholly unnecessary, but for the fact that the inadequacy, reported by the Auditor, of resources to pay all claims against the treasury, is likely to produce conflict between claimants; and all parties interested are entitled to know the grounds upon which any decision affecting their rights is based.

JOS. H. MAUPIN,
Attorney General.

The Penitentiary Commissioners have power to parol any prisoners who are inmates of the Reformatory, under regulations established by the commissioners.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 3, 1891.

HON. WILLIAM A. SMITH,
Warden Colorado State Penitentiary.

DEAR SIR—I beg leave to acknowledge receipt of your letter of May 31st, wherein you request an opinion from me as to whether or not the commissioners have authority, under the law relating to the State Reformatory, to parol any prisoners who are now inmates of that institution.

Upon a careful examination of the act creating the State Reformatory, I find that Section 24 of the act authorizes commissioners to make requisition upon the warden of the State Penitentiary, who shall thereupon select from among the convicts of the State Penitentiary, who are well behaved and most promising, the number required by the commissioners, and transfer them to the reformatory, for education and treatment, "under the rules and regulations thereof." Section 23 of the same act provides that "said commissioners shall also have power to establish rules and regulations, under which prisoners in the reformatory may be allowed to go upon parol outside the reformatory buildings and enclosure, but so remaining while on parol in the legal custody and under the control of the board of commissioners, subject at any time to be taken back within the enclosure of such reformatory."

There is nothing in this language last above quoted which indicates that the rules and regulations relating to

the parol of prisoners shall be applicable to those inmates of the reformatory who may be sentenced thereto by the courts. On the contrary, I infer from the language that these rules and regulations shall apply to all prisoners in the reformatory, regardless of the question as to whether they have been sentenced thereto directly by the courts, or whether they have been transferred thereto in accordance with Section 24 of the act.

I am, therefore, of the opinion that the commissioners have full power and authority to parol any prisoners who are now inmates of the reformatory, under such rules and regulations as may be established by the commissioners.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. An execution sale of the interest of a purchaser of school lands, held to be void for indefiniteness of description.

2. The statements of the county clerk, outside the record, do not repair deficiencies therein.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 11, 1891.

HON. MATT. FRANCE,
Register State Board of Land Commissioners.

DEAR SIR—In reply to your inquiry relating to sufficiency of record proof of the claim of Isaah W. Hill, that he has purchased, at execution sale, the interest of one William Sabine in certain school lands, situated in the county of Conejos, of this State, I have to say:

First—As stated in my previous letter of advice to you on this subject, the certified copy of the record of levy and said execution sale, as first furnished by the county clerk of said county, shows said levy and sale to have been void, by reason of indefiniteness of description of said land in said levy.

Second—Said clerk now sends you an amended transcript, with this certificate: "I, N. G. S. (clerk), do certify this to be a true and correct copy of levy and sale, made according to statements and levy." Said certificate can properly relate only to his record, and has nothing to do with statements made to said officer with reference to said

sale. Said certificate, therefore, still fails to show that in said levy there was sufficient description of the land sold to pass title thereto.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

Warrants against the appropriation for the World's Columbian Exposition should be signed by the Governor, upon requisition of the board.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 12, 1891.

HON. JOHN L. ROUTT,
Governor.

DEAR SIR—Recently, you handed me a copy of the act providing "for the collection, management and display of the products of the State of Colorado at the World's Columbian Exposition of 1893, creating a Board of World's Fair Managers, and making appropriation therefor," with the request that I advise you as to whose duty it is to sign warrants drawn upon the fund set apart in said act.

Section 33 of Article V. of the Constitution provides that "no money shall be paid out of the treasury except upon appropriation made by law, and on warrant drawn by the proper officer, in pursuance thereof." Ordinarily, the State Auditor is, under the law, the proper officer to sign all warrants drawn upon the public treasury, the language of the law being that the Auditor shall "draw all warrants upon the treasury for money, except only in cases otherwise expressly provided by law."

By reference to Section 8 of the act in question, it will be seen that the State Treasurer is directed to pay the appropriation therein made, or so much thereof as may be necessary, from time to time, on the requisition of said board, signed by the Governor, and accompanied by estimates of the expenses, to the payment of which the money so drawn is to be applied."

The effect of this language is, and the evident purpose of the law-makers was, in my opinion, to take from the general rule the power and duty of the Auditor to sign

warrants and to impose upon the Governor the duty to sign, on the requisition of the board, all warrants drawn upon this particular fund.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The salaries of the members of the Water Commission, created by the act of 1889, are "legislative expenses," and entitled to the same priority in payment as other expenses of like character.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 23, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—Early in this month, you requested me to advise you whether the appropriation made to pay the Water Commission established by the act of 1889, is an appropriation to defray "legislative expenses," within the meaning of the opinion of our Supreme Court, *In re* Appropriations, 13 Colo., page 328, or whether you are authorized to pay it as such, giving preference over other appropriations, from the general public revenue, either under the act of 1889, or under House bill No. 58 of the last General Assembly.

The act under which the commissioners were appointed requires them to "enter upon the work of drafting, framing, digesting, and codifying a complete system of law, in accordance with the provisions of the Constitution, and subject to rights vested thereunder, embracing the whole subject of the waters of the State." They were required by the act to report to the Eighth General Assembly the result of their labors, in the form of "a bill to enact the recommendation of the commission into a law, with a proper title for such proposed enactment."

The act further provided that it should be the duty of the Secretary of State, when such report should be delivered to him, to cause five hundred copies thereof to be printed and bound in pamphlet form, and upon the organization of the Eighth General Assembly, he (the Secretary of State) should distribute to each member thereof three copies of said report.

All this is, in its nature, precisely what, under ordinary circumstances, some member, or some committee, of one or both houses of the General Assembly would have done, and being done by an independent commission, it is, nevertheless, in aid of, and a preparation for, the work of the General Assembly as strictly, it seems to my mind, as the labors of a clerk to one of the committees of the House or Senate, and their compensation as clearly legislative expense as the salary of such clerks; as essentially so as the salary of the private secretary of the Governor is part of the expense of the executive department, or the salaries paid to the late Commission of Appeals is part of the expense of the judicial department.

Indeed, the relation of the water commissioners towards the General Assembly was quite analagous to that of the members of the Commission of Appeals to the Supreme Court. The one were required to prepare and recommend a bill for adoption by the legislative department; the other, to prepare and recommend, in each of the several cases submitted to them, a judgment settling the rights of parties, with an opinion assigning reasons therefor.

If in the latter case, the salaries of the Commission of Appeals were paid as part of the expenses of the judicial department; in the former, the salary promised to the Water Commission ought to be paid as part of the expenses of the legislative department. Nor does it, to my mind, make any difference that the salary promised was not paid, and that the General Assembly have reiterated the injunction for such payment. The nature of the service is not changed by the enactment into a law of House Bill No. 58. This act of 1891 did not repeal the act of 1889; the latter act is still in full force. It provides that "each of said commissioners shall be entitled to receive for his services, upon the making of said report, as herein provided . . the sum of two thousand dollars." And for the purpose of paying said salaries and the expenses authorized by the act, "there is hereby appropriated out of the general fund of the State, not otherwise appropriated, the sum of ten thousand dollars, or so much thereof as may be necessary."

In my opinion, the salaries thus provided for should have been paid upon the making of said report, in the same manner as other expenses of the legislative department were and are paid; and that the said commissioners are now entitled to be paid out of "any moneys in the

treasury not otherwise appropriated," whether it be the surplus of 1890, or the revenue on hand, or hereafter to be on hand, from the revenues of 1891.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The Secretary of State is not charged by law with the duty of preventing the violation of the law "to regulate the detective business in this State." Prosecution for such violations is part of the duties of district attorneys.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 29, 1891.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—You ask me whether or not there is any official duty for you to perform to prevent the frequent violation of a law, approved April 4, 1887, entitled "An act to regulate detective business in this State," by the disregard of which, by persons engaging in said business, you say the State loses a considerable income from licenses due from the persons aforesaid, and the public is without the guaranty which said law was intended to provide; that said persons are such as may properly be, and are, lawfully vested with power to discharge the duties incident to said business.

In reply, permit me to say that you cannot directly proceed against the offenders named. Acting upon the information thus furnished me, however, I will call the attention of the district attorneys generally to the fact that said law is being violated, and request them to rigidly enforce the provisions of Section 9 thereof, which is as follows:

"SEC. 9. Every person who shall carry on the detective business in this State without first having obtained a license under the provisions of this act, and every person not being the agent, servant, assistant or employé of a person, firm or corporation duly licensed under the provisions of this act to carry on the detective business in this State, who shall engage in any such business in this State, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $300 nor more than $1,000, or by imprisonment in the

county jail not less than three months nor more than one year, or by both such fine and imprisonment."

A faithful compliance with such request will, I think, soon correct the evil of which you complain.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. The General Assembly has no power to order, by concurrent resolution, the printing of a number of copies of the State Engineer's report, in excess of the number fixed by law, "for distribution among the people."

2. A contract made pursuant to such resolution, is void, and no warrant should issue in payment for work done pursuant to such void contract.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, July 10, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—You ask my advice as to whether or not you shall audit and allow the claim of Collier & Cleaveland for the sum of seven thousand five hundred dollars, for printing the State Engineer's report, pursuant to Senate Concurrent Resolution No. 15, which is as follows:

"*Be it resolved by the Senate, the House of Representatives concurring*, That three thousand copies of the State Engineer's report be printed, as prepared, to be, by the State Engineer, distributed among the people of the State."

Said resolution passed both houses of the Eighth General Assembly, February 10th, but was not presented for executive approval.

The question whether or not said claim is valid, involves the question of law, whether or not the General Assembly had any power to order said printing by concurrent resolution. Counsel for claimants have called my attention to the fact that heretofore the General Assembly of this State has made no distinction between joint and concurrent resolutions, and that the terms have been continually used interchangeably to describe resolutions approved by the executive, and those not so approved. Usage, however, has given a distinct and different meaning to each of said terms. A learned writer on this and kindred subjects, defines the two kinds of resolutions as follows:

"A joint resolution, like a public act or statute, is one which is passed by both houses, and signed by the president."—Ency. Polit. Science, vol. 3, page 84.

"A concurrent resolution is adopted by both houses, chiefly on the subject of adjournment of the session. Unlike a joint resolution, it does not require the signature of the president."—*Id.*, page 80.

A joint resolution is, in other words, an informal method of passing a law; and such a law, if not otherwise invalid, will be effective, unless said method of enactment is in conflict with constitutional prohibition. Some laws of congress are enacted in this way. Likewise, under the Constitution of 1848, of the State of Illinois, the Supreme Court of that State held that a joint resolution, directing the publication of a certain number of the reports of the Adjutant General, had "the force of law." (People *ex rel.*, etc., *vs.* Tyndale, Secretary of State, 47 Ill., 538.)

But no law can be passed in this way by the General Assembly of the State of Colorado. Article V., Section 17, of our Constitution, provides that "no law shall be passed except by bill," etc. The term, "bill," is defined, by the authority just above cited, as being "any act of" proposed legislation commencing with "Be it enacted," etc. This is the universally accepted meaning of the term. (Sutherland on Statutory Construction, Sec. 60.) And accordingly, our State Constitution (Art. V., Sec. 18) further provides that the style of the laws of this State shall be, "Be it enacted by the General Assembly of the State of Colorado." Therefore, a joint resolution, as above defined, intended to have the effect of the law, would be void, because not enacted in the above named constitutional formula. (Sutherland, Section 64, and cases cited.) But the resolution upon which the claimants rest their title is not even a joint resolution, as above defined, since it is a resolution not signed by the Governor, nor presented to him for approval or veto.

If legislation could be effected in this way, and money disbursed from the State treasury for other than legislative expenses proper, the Legislature might wholly evade the executive veto power. Notwithstanding the prescribed form of enactment above named, which seems to preclude all conceivable legislation in any other form, the framers of our Constitution took the additional precaution to provide, by Section 39, Article V., that "every order, resolution or vote to which the concurrence of both houses shall be nec-

essary, except on the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the Governor; and before it shall take effect, be approved by him, or, being disapproved, shall be re-passed by two-thirds of both houses, according to the rules and limitations prescribed in cases of a bill." It is obvious that either house, subject to the limitations imposed by statute, in compliance with Sections 28 and 29, Article V. of our Constitution, may, for its own purpose solely, order printing and contract for services which, when performed, would constitute a valid claim to payment from the State treasury. But I think it is more than obvious—indeed, that it cannot be controverted with any show of reason—that neither house could, without the concurrence of the other, incur the expense of printing the reports of another department of the State administration "for distribution among the people of the State." And if the concurrence of both houses is essential to the validity of such action, the Governor's approval is, by virtue of Section 39 of the Constitution, above quoted, equally essential. We must conclude, therefore, that even if Section 17 had been omitted from the Constitution, inasmuch as the resolution under consideration was neither approved by the Governor nor passed over his veto, it is void and of no effect, further than as an expression of the sense of the General Assembly upon the subject therein mentioned.

I must, therefore, advise you to refuse to draw a warrant for the payment of any part of the first aforesaid claim, greater than would have been valid by virtue of the statute in force at the time said printing was undertaken, and applicable thereto.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

N. B.—This opinion is supported by a subsequent decision of the Court of Appeals, in the case of Carlile *vs.* Henderson, reported in Vol. II., Court of Appeals Reports.

The act of March 15, 1887, relating to commutation of life sentences, does not authorize the warden of the penitentiary to discharge a prisoner, under life sentence, at the end of the time mentioned in said act, unless said prisoner is pardoned by the executive.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, July 11, 1891.

HON. WILLIAM A. SMITH,
Warden Colorado State Penitentiary.

DEAR SIR—In your recent communication, you direct my attention to an act, approved March 15, 1887, concerning the commutation of life sentences, and request me to advise you whether, under said act, prisoners sentenced to the State penitentiary for life, prior to the passage thereof, are entitled to a discharge when they shall have served a sentence of twenty-five years, less their allowance for good time. Under Section 2 of this act, the class of prisoners referred to in your letter are not entitled, as a matter of absolute right, to a discharge, but the section is more in the nature of a recommendation, of this class of prisoners, to executive clemency, and the Governor may or may not extend this clemency, as his best judgment dictates; or, in other words, Section 2 has little or no force, and leaves the question of pardon right where it was before—in the sound discretion of the Governor. Doubtless, the Governor of the State, upon having his attention called to the fact that a prisoner in the penitentiary, sentenced thereto prior to the passage of the act in question, shall have served the sentence mentioned in said Section 2, and shall be satisfied that the prisoner's conduct, while in prison, has been good, would grant him a pardon; but before you would be authorized to discharge such a prisoner, it would be necessary that you have the Governor's warrant authorizing you so to do.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

Section 34, Article V. of the Constitution, does not prohibit the granting of pensions to those who have rendered past military service to the State.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, July 16, 1891.

HON. JOHN C. KENNEDY,
Adjutant General.

DEAR SIR—In reply to your inquiry of July 13th, as to what effect, if any, Section 34 of Article V. of the Con-

stitution has upon the power of the Legislature to make certain pension appropriations, I have to say that it is my opinion it has no bearing whatever upon this class of legislation.

The language of the section is: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes, to any person, corporation or community not under the absolute control of the State, nor to any denominational or sectarian institution or association."

A pension is defined by Webster to be an annual allowance of a sum of money to a person, by the government, in consideration of past services.

In theory, at least, it is an arbitrary payment of money, by the money-giving power, for what it considers services. It is not a charitable donation, nor a gratuity. In one sense, it is a gift, it is true, but one that is supposed to be earned by honest devotion to the country's interest and safety.

At every period of our national history, and in the history of many of the States, laws have been passed giving pensions, where needed and deserved, to those who have been wounded and rendered incapable of self-support while in the military service of the State or nation, or to the families of, or other dependents upon, those who have died in the service.

And it seems to me perfectly proper, just and right, that the popular appreciation and thanks for such services should be expressed in this way, instead of in empty words; and, so far as I am able to learn, there has at no time been any serious objection, from any source, to the passage of such laws, nor is there likely to be, so long as the objects of these appropriations are deserving, and no attempt is made, under the guise of such laws, to despoil the public treasury or unjustly burden the taxpayers.

The appropriations referred to in your letter were made by the last General Assembly, for services rendered the State in the Ute war, and at a time when certain counties of the State were being overrun, and the lives of the citizens thereof endangered by hostile Indians.

It was eminently just that the Legislature should at least take care of the dependent families of those who were killed in that war, and this is all that is sought to be done by the acts in question. In my opinion, there is

nothing in the section referred to, or in the Constitution of this State, forbidding the Legislature from making these appropriations.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

An appropriation to pay for rent of rooms for the various departments of State, authorizes the renting of rooms for the Railroad Commissioner.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, July 27, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—You submit to me the following statement and question: "The last Legislature appropriated $36,000 for executive and judicial rent. Can this appropriation be lawfully drawn to pay rent for rooms, or offices, for the Railroad Commissioner?"

Permit me to say, that the law is not precisely as you state it. The language of the general appropriation act is: "For rent of executive and judicial departments, including heat and water, to pay the deficiency for the year 1890, *and for rent of rooms for the various departments of State*, and for the years 1891 and 1892, the sum of thirty-six thousand dollars ($36,000)."

The limitation to the executive and judicial departments, you will observe, relates to the deficiency for the year 1890. As no other deficiency for the year 1890, than for rent, etc., for the two departments named, is provided for, it is evident that no money can be applied for deficiencies other than for rents of the two departments named. But for the current year, and the year 1892, provision is made for the various departments of State, *i. e.*, all the departments of the State government proper, of every kind and degree.

The Fifth General Assembly, by act approved April 7, 1885, created the office of Railroad Commissioner, and imposed upon its incumbent the duty of the supervision of railroads—a duty analagous to that of the Superintendent of Insurance, who has the supervision of insurance companies and insurance interests within the State.

That the phrase, "various departments of State," used in the appropriation act, includes both of the departments last named, and other departments besides, and that its meaning cannot be fairly restricted to the Governor's office and apartments for the Supreme Court, I think is too plain for argument.

My opinion is, therefore, that a reasonable part of said appropriation may be lawfully applied to the payment of rents for rooms, or an office, for the Railroad Commissioner. Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. Such a construction should be given an act of the General Assembly as will give it effect, and not defeat it.

2. To avoid declaring a statute a nullity, its title and preamble, other laws on the same subject, and the history of the matter to which it relates, may be considered.

3. In this case, the language of the statute, "1877," construed to mean 1887.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, August 20, 1891.

His Excellency, JOHN L. ROUTT,
Governor of Colorado.

SIR—On behalf of the Board of Capitol managers, you ask me what is the proper construction of Senate bill No. 284, entitled "An act to provide for the relief of certain laborers who have performed work on the capitol building of the State of Colorado, and have not been paid therefor." You say: "The original roll, as signed by the Speaker of the House of Representatives and President of the Senate, approved by me, and on file with the Secretary of State, makes an appropriation for certain laborers who worked on the building in the year 1877. If this be taken as the correct date, the bill becomes nugatory and void, for the reason that in that year no capitol building had been started and no work could possibly have been done on the same." To fully support your last statement, it is only necessary to recall familiar State history. The first mention of the State capitol is in Section 2, Article VIII. of the State Constitution, which directs the General Assembly, at its first session thereafter, to provide for the location of the State capital. The Constitution was adopted

July 1, 1876, and pursuant to the direction aforesaid, the capital was located by vote of the people, November 8, 1881. Thereafter, "an act to provide for the erection of a State capitol building at the City of Denver, and creating a board of management and supervision, and appropriating money therefor," was passed by the Fifth General Assembly, and was approved by the Governor, and went into effect April 1, 1885. (Session Laws, 1885, p. 53.)

This was the first law enacted under which any contract relating to the erection of, or work on, the capitol building could be contemplated.

There are, therefore, no persons in existence who are entitled to payment of any part of the money appropriated by said bill, if it is literally construed; and such appropriation would, in consequence, be wholly inoperative.

The board is thus compelled to decide whether it is its official duty to withhold payment from the intended beneficiaries of such appropriation, or give the law such a construction as will wholly change its terms, by substituting some year subsequent to 1885 for the year 1877, as it appears in said bill. It is in Section 1 of said bill that the designation of the year 1877, as above mentioned, occurs. The same section makes the appropriation of five thousand dollars "for certain laborers who have heretofore worked for W. D. Richardson, at Denver, Colorado, ... upon the capitol building of said State of Colorado, and such laborers as may have worked in the granite quarries at Georgetown for said Richardson," etc. Counsel for the claimants under said bill have satisfied me that the said contract with W. D. Richardson is shown, by the proper records, to have been entered into in the year 1886, and that the said Richardson became insolvent in the year 1887. The preamble of said bill also recites that "one W. D. Richardson" was the former contractor for the erection of the said capitol building; that said Richardson employed certain laborers upon the said capitol building, and certain laborers at the granite quarries, near Georgetown, Colorado, in quarrying granite for use in said capitol building, for 1887; and that said laborers, on account of the failure of said Richardson to comply with his contract, and his insolvency, have not been paid, etc. These facts, certainly, strongly indicate that it was the intention of the Legislature to make an appropriation for laborers who worked during the year 1887, although said Section 1 plainly designates the year 1877. But when, in addition

to the foregoing facts, an examination of the legislative records discloses the fact that the original bill which passed the two houses of the General Assembly, and from which the enrolled bill was copied, does not name the year 1877 at all, but in said Section 1 thereof names the year 1887 instead, the conclusion is irresistable that the last-named year is the one intended by the Legislature, and that the appearance of a different year in the enrolled act is due to clerical mistake. It remains to be considered whether the giving effect to such legislative intent would violate established and salutary rules of statutory construction, which are designed to protect the expressed legislative intent, in any case, from being annulled or emasculated by judicial interpretation.

The English doctrine seems to be, that it is not competent to go beyond the Parliament roll, and that the "enrolled act is to be determined by itself, whether it be a statute or not." In Richards *vs.* McBride, L. R. 8, Q. B. 119, the court say: "But we cannot assume a mistake in an act of Parliament. If we did so, we should render many acts uncertain by putting different constructions on them, according to our individual conjectures. The draftsmen of this act may have made a mistake. If so, the remedy is for the Legislature to amend it." The court proceeds further to say that, even in case of ambiguity, the courts cannot consider what occurred in Parliament, "but must look to what is within the four corners of the act, the grievance to be remedied," etc. Many of the United States courts have adopted this rule, but a greater number have adopted what our Supreme Court has called the American rule. (See *In re* Roberts, 5 Colo., 525.) In the case last cited, the court held that the enrolled act, duly signed and authenticated by the proper officers, and in the proper custody, is *prima facie* evidence of what the law is, and of the regularity of its constitutional enactment. But this evidence is not conclusive. It should be stated, however, that in said case the sole question was whether or not the statute then in controversy had been constitutionally enacted; and the court held, as a premise to the propositions above stated, that, of necessity, the records and journals of the two houses must be investigated, since such records are the original evidence of the essential facts in the case.

I think most of the cases cited by counsel are not in point, for the reason that they announce the principle that the journals of the Legislature may be consulted to ascer-

tain the meaning of the act when there is an ambiguity; and although the preamble of the act under consideration names the year 1887, yet I think there is no such parity between the preamble and the act itself as will create ambiguity when their recitals differ, if the language of the act is plain. It is uniformly held that when the recitals of the preamble and of the act itself differ, the act controls, and the conflicting part of the preamble will be disregarded. "The preamble," says Story, "is no part of the law." (Story on Const., Sec. 459.) "But," says Lord Coke, "it is a good means to find out the meaning of the statute, and is a true key to open the understanding thereof." (Co. Litt., 79 *a*, Plowd., 369.) This states the entire scope and purpose of the preamble, and its proper service in this case will hereinafter fully appear.

There are other defects, however, which create greater exigencies than can possibly arise from ambiguity. It is easily perceived that an omission or mistake which, uncorrected, renders the statute a nullity, is such a defect.

In such a case, the weight of authority, in this country, authorizes a construction which will give effect to the legislative intent.

"Legislative enactments are not, any more than any other writings, to be defeated on account of mistakes, errors, or omissions, provided the intention of the Legislature can be collected from the whole statute; and the title and preamble may be referred to for this purpose." (Suth. Stat. Const., Sec. 260.) In the case of State *vs.* McCracken, 42 Texas, 383, cited by the author in support of the proposition just stated, it is held that the date, 1871, should be read 1856, the court assigning as a reason for its judgment, that there was no statute passed in any other year than 1856, which answered the description of the statute sought to be amended by the act. Counsel have cited numerous cases to the same effect, but I think that none of them are so pertinent to the present inquiry, and none of them so clearly define the case in which the court may resort to extrinsic circumstances to ascertain and give effect to the legislative intent, contrary to the literal meaning of the language of the act, as the comparatively recent case of Edwards *vs.* D. & R. G. R. Co., 13 Colo., 60. In that case, the statute required all corporations organized for gain to pay to the Secretary of State, "upon the *issuing* of a certificate, as provided for in said chapter," a certain fee. In the chapter so designated, no provision was made for the

issuing of a certificate. Hence, a literal construction would render the section meaningless.

The court say: "When two legislative purposes, each of which render the law effective, are suggested, the courts may not ordinarily supply or substitute a word in order to give one of such preference over the other; but where the alternative is presented of attributing to the enactment a rational purpose and effect, or of regarding it as a dead letter on the statute book, the courts, when necessary, exercise great latitude in the endeavor to avoid the latter contingency. The view that a solemn legislative provision is a useless and lifeless thing, should only be entertained when no reasonable intendment can be fairly deduced therefrom, after diligent and industrious search, aided by all pertinent rules of statutory interpretation."

In support of this view, the court, with other authorities, quotes from Potter's Dwarris on Stat. Const., page 128, as follows:

"The interpretation which renders a treaty (or statute) null and void cannot be admitted; it is an absurdity to suppose that after it is reduced to terms it means nothing. It ought to be interpreted in such a manner as that it may have effect, and not to be found to be vain and illusive." The court further proceeds to say, in effect, that the Legislature "erred in the selection of a word," and that the word "issuing" was inadvertently substituted for the word "filing," employed in a former statute, and that the statute should be so construed as to require the fee named therein to be paid when the certificate was filed. The court, in that case, discovered the mistake by comparing the statute in controversy with all other laws on the same subject; so, I think, in this case, comparison of the bill submitted to me, including the preamble, with other laws, passed from time to time, relating to the capitol building, is all that is necessary, without considering other facts above stated, to establish the fact that the presence of the date, 1877, in said bill, is a mistake which should be corrected by construing the law to mean 1887.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

1. Deferred payments on sales of State lands made under the law of 1887, bear ten per cent. interest, regardless of agreement between the Board and purchasers.

2. And purchasers having contracted to pay ten per cent. on extended payments, cannot, after having enjoyed the benefit of the contract, question the power of the Board to make it.

3. Independently of any contract, the interest on overdue amounts, prior to June 20, 1889, is ten per cent.; since that date, it is eight per cent.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, August 28, 1891.

HON. MATT FRANCE,
Register State Board of Land Commissioners.

DEAR SIR—You inform me that a number of the purchasers of State lands at statutory sales, by the terms of which a principal part of the respective payments therefor were deferred, have failed to make said payments when due; and that they dispute the right of the State to collect the ten per cent. per annum on all overdue payments mentioned in the certificate of purchase issued to each of said purchasers; and you ask me what interest you shall collect.

I do not know upon what ground objection is made, but assume that the objectors think they are only bound to pay the rate of interest required by the statutes authorizing said sales, and in force at the time thereof, respectively, and that the said provision in the certificate of purchase does not have the force of a contract to bind them to pay a different rate of interest. No question can arise with regard to sales made under the law of 1887, for it provides that on deferred payments there shall be paid "interest at the rate of seven per cent. per annum, and ten per cent. per annum on all amounts not paid when due." The law and the contract coincide as to rate of interest to be paid in the case mentioned. (Session Laws, 1887, Section 15, page 334.) The inquiry must, therefore, be directed to sales made before that law took effect, which was March 22, 1887, and after the date of its repeal, which was June 15, 1889.

Without citing numerous authorities to this effect, I will say, briefly, that the acceptance of such certificates by said purchasers is *prima facie* proof that they respectively assented to all of the conditions therein recited, and that they accordingly agree to pay interest at the rate of ten

per cent. on all overdue payments. And it will not avail them, after having had an extension of time thereunder, to say that the law did not empower the Board of Land Commissioners to make any contract relating to delinquent payments.

"Where it is a simple question of authority to contract, arising either on the question of irregularity of organization or of power conferred by the charter (or statute), a party who has the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." (Sedgwick Stat. and Const. Constr., 73.) This was said with reference to corporations, but it is a rule which applies to all contracts between persons and public bodies.

Independently of said contract, or supposed contract, and excepting about two years last past, there is no difficulty in determining the rate of interest that you should charge on the said overdue deferred payments. Our Legislature, by act approved March 22, 1889, fixed the legal rate of interest at eight per cent. per annum. This act, not having an emergency clause, went into effect ninety days thereafter, or on June 20. Prior to this time—for a period covering the dates of all of said sales, prior to June 20, 1889—the legal rate of interest was ten per cent. per annum. (G. S. 1883, Sec. 1706.)

The rates of interest fixed by the contracts of sale aforesaid are usually much less than ten per centum, and such rates are all that can be lawfully demanded of the purchasers during the periods, respectively, for which, by the terms of said contract, said payments were deferred. After said payments become due, however, the rate of interest thereon is no longer fixed by contract, but by the statute fixing the legal rate of interest in force during the time such payments remain delinquent.

Clark *vs.* Russell, 1 Colo., 52;
Brown *vs.* Steck, 2 Colo., 77.

Where one contracts to pay a principal sum, at a certain future time, with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract, to be computed according to the rate prescribed by

law, and not according to that prescribed in the contract, if that be more or less.

O'Brien *vs.* Young, 95 N. Y., 428;
MacComber *vs.* Dunham, 8 Wend., 550;
Burnhisel *vs.* Furman, 22 Wall, 170;
Halden *vs.* Furst Co., 100 U. S., 72.

It is evident, therefore, that, regardless of the recitals of said certificates of purchase, it is your duty to collect interest on overdue payments, at the rate of ten per centum per annum, up to June 20, 1889; in the absence of any contract, evidenced by said certificates, it would be your duty to collect eight per centum after the date last aforesaid; and, according to the terms expressed in said certificates, ten per centum for the entire time.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. A clerk in the Insurance Department is entitled to pay for work done after office hours, in addition to his salary, if his contract of employment related to only office hours.

2. The State Treasurer has the right, and it is his duty, to inquire into the terms of such contract, and refuse to pay the warrant for the claim, if the work done was not contemplated by the contract.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, September 22, 1891.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—You inform me that the Insurance Department has a clerk employed at a regular salary of $208.33 per month, and that he has since about the 29th of last May presented you two warrants, aggregating $950, for extra work, alleged to have been performed by him for said department, one of which you paid and the other you refused to pay, awaiting my opinion as to whether or not the said clerk can, while drawing a regular salary, legally claim for extra work, and whether it is your duty to pay warrants drawn therefor on the insurance fund.

The extra work, I am advised, was done on the annual report of the Insurance Department, and out of regular business hours, but whether performed voluntarily by said

clerk, or upon request of the Superintendent, and agreement to pay extra therefor, I am not advised.

The rule of law is, that an officer who accepts an office to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the compensation fixed, though it may be inadequate, and that he cannot legally claim additional compensation, even for incidental or collateral services, provided they properly belong to or form part of the duties of the office. (Mechem on Public Officers, Sec. 862.)

I do not believe this rule would apply to the clerk in question, for the reason he is not, in my opinion, an "officer" within the meaning of the rule.

He is simply an employé in a public office, with such duties to perform as may be required of him by the head of the office. As such, he is only bound, in the absence of an agreement fixing the number of hours that should constitute a day's work, to work the usual number of hours per day required in said or similar departments. But while he is not bound, in the absence of an agreement, to work more than the usual number of hours, should the nature of the work be such, at times, that he felt it his duty, as a conscientious employé, to perform it, and should do so without any special request or special agreement to pay for it, the extra work should be regarded as done voluntarily, without any legal right to compensation.

You have a right, and it is your duty, before paying these warrants, to ascertain the facts of the special agreement, if any, for the "extra work;" and if not made in good faith, or if only an afterthought, or in the absence of a special contract, and a necessity therefor, you should refuse to pay such warrants, as having been issued without consideration and without authority of law.

Concerning the warrants issued to the son of the deputy superintendent of insurance, for $150 and $900, respectively, the latter of which you have refused to pay, you furnish me with no facts whatever, and I am in possession of none, further than that he (the son) "assisted in the office," and hence I can only advise you in a general way that the expenses of the insurance department, which you, as State Treasurer, are required to pay, are *necessary* expenses only; and in the absence of a satisfactory showing that a warrant drawn upon the insurance fund was issued in good faith, upon a valid claim, you should refuse to pay it.

You also desire to know if the deputy superintendent of insurance can lawfully draw on the insurance fund for his expenses to attend a meeting of the superintendents of insurance, to be held in St. Louis, Mo., some time during the present year. I am clearly of the opinion he cannot.

Very respectfully,

JOS. H. MAUPIN,
Attorney General

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, September 24, 1891.

HON. W. A. HAMILL,
Railroad Commissioner, State of Colorado.

SIR—I am in receipt of your letter of the 22d inst., asking my opinion with reference to the powers conferred upon you by Section 7 of "An act concerning railroads," etc., approved April 6, 1885.

In reply, permit me to say that it is my opinion that said section, by implication, confers upon you power to make a lower rate per ton per mile, in car-load lots, than shall govern shipments in less quantities than car-load lots; and also, to make lower rates for lots of not less than five car loads than for single car-load lots, except in cases otherwise provided for in said section. Of course, rates so fixed by you must be reasonable.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The power to appoint the Brigadier-General in the State Militia is vested in the Governor, by the Constitution of this State.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, October 15, 1891.

HON. JOHN C. KENNEDY,
Adjutant General.

DEAR SIR—In your letter of October 10, you say: "There is an apparent conflict between the provision of the statutes and the Constitution of this State, with relation to the authority by which the positions of general, field, and staff officers of the militia are to be filled, which raises a question of vital importance to the State as well as to the welfare of its national guard;" and my opinion is asked upon

the question, whether said positions should be filled in the manner provided by Section 2 of Article III. of the act in relation to the organization of the militia of the State, found at page 387 of the Session Laws of 1889, or whether such positions should be filled by appointment by the Governor, as prescribed by Section 3, Article XVII. of the Constitution of the State.

Permit me to say, that the acts of the Legislature are entitled to the highest respect, and courts never construe them to be in conflict with the Constitution, if, by any reasonable construction, they can be reconciled therewith; and all doubts are uniformly resolved in favor of the validity of statutes. It is natural and proper that this office should be much more reluctant than the courts to declare any act of the General Assembly unconstitutional. Yet, while it can never be presumed that the Legislature has intentionally disregarded the plain letter of the Constitution, it is sometimes, in the haste of legislation, overlooked, and legislators sometimes err in construing it.

In this State, and in every State of the American Union, the Constitution is the fundamental and paramount law; and whenever an act of the General Assembly is clearly in conflict with it, administrative officers, as well as the courts, should not hesitate to disregard the statute and enforce the Constitution.

By reference to Section 3 of the article of the Constitution referred to in your letter, we find that "the Governor shall appoint all general, field, and staff officers," etc. Section 3 of the act of the Legislature, provides that "the brigadier general shall be chosen from the field and line officers of the national guard, and shall be elected by the vote of all such officers of the organized militia force who have been duly commissioned," etc.

As I am advised by you, and according to all military rules and regulations, and established military precedents, the brigadier general is a general officer; and if this be true, he, as well as other general, field, and staff officers, should, under the section of the Constitution referred to, be appointed by the Governor; and the act of the Legislature providing that he shall be elected, is, in my opinion, in direct conflict with the section of the Constitution quoted.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The money received by the State of Colorado, by virtue of an act entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture," etc., should be paid by the State Treasurer to the local treasurer of the Agricultural College, upon the order of the trustees of said institution.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, October 15, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—You inform me that a demand is made by the local treasurer of the State Agricultural College for the amount received by the State of Colorado under an act of Congress, approved August 30, 1890, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and mechanical arts, established under the provisions of an act of Congress, approved July second, eighteen hundred and sixty-two," and ask me whether or not such sum should be paid pursuant to such demand.

Section 2 of said act of Congress provides that "the sums hereby appropriated to the States and Territories for the further endowment and support of colleges shall be annually paid . . . by the Secretary of the Treasury . . . . out of the treasury of the United States to the State or Territorial Treasurer, or to such officers as shall be designated by the laws of such State or Territory to receive the same, who shall, upon the order of the trustees of the college . . . immediately pay over said sums to the respective colleges or other institutions entitled to the same; and such treasurer shall be required to report to the Secretary of Agriculture and to the Secretary of the Interior, on or before the first day of September of each year, a detailed statement of the amount so received and of its disbursement."

The said appropriation by Congress was accepted by the State of Colorado, subject to the law above recited and other conditions named in said act of Congress, by act of the Eighth General Assembly, entitled "An act in behalf of the State of Colorado, to accept, ratify, and assent to the provisions, terms, grants, and conditions of" the act of Congress aforesaid, approved April 6, 1891.

From all of which it clearly appears that, upon proper demand made by the trustees of the State Agricultural College, the money appropriated by said act of Congress should be paid out of the State treasury to the local treasurer of said college.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. An expression of opinion declined, because not the duty of the Attorney General to give it, and such expressions, if in conflict with the opinions of those whose duty it is to advise, would inevitably lead to complication.

2. The matter in controversy should be submitted to a court of competent jurisdiction, as soon as possible.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, October 20, 1891.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—On my return to my office, after an absence of some days on business which required my attention in another part of the State, I find awaiting me your letter of inquiry on behalf of "various county clerks and boards of commissioners of this State, relative to the tax levy recently made by the State Board of Equalization." You say:

"They question the right of the board to levy, and their own right to extend, a tax for the Ute war debt, and interest on capitol building bonds, claiming same to be in excess of the constitutional limit;" and you ask my official opinion upon the questions thus presented.

The questions, respectively, involve the constitutionality of the statute passed by the last General Assembly, to provide for the payment of the Ute war debt, and the correctness of the heretofore generally accepted construction of the statute of 1883, providing for the issuing and levy and collection of taxes for the payment of the capitol building bonds, and interest thereon.

It is evident that an authoritative decision of these questions will either fix upon the tax-payers the obligation to pay said assessments, or will defeat the claims of the intended beneficiaries of the provisions of said statutes. Our Supreme Court, in the case of *In re* Appropriations,

13 Colo., 316, say that a question therein submitted to it "would almost necessarily involve important private and corporate rights, and, therefore, should not be decided in an open opinion like this, even though some considerations *publici juri* may be involved, but should be left for adjudication in the ordinary course of judicial proceedings."

The court, in that case, further referred to the danger of "reaching erroneous conclusions, when unaided by the vigilance of opposing counsel"—a danger of which I cannot fail to be sensible in this case; and when it is further considered that the question asked is one which the law prescribing my official duties does not require me to answer, and upon which, therefore, my opinion would not be authoritative, or entitled to any more respect, *per se*, than the opinion of any other attorney on the subject, it is natural that I should hesitate to express any opinion thereon, since it would only be advisory at best, and might—and if conflicting with the opinions of the legally constituted advisors of the aforesaid county officers, would almost inevitably—result in complication and confusion.

The only view, therefore, that I feel at liberty to express on the subject is, that steps should be at once taken to bring the matter before the courts, who alone have the authority to determine said questions, and that such determination be hastened with all possible speed.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. A declaration of acceptance of office which is substantially defective, is wholly invalid; and a lack of acknowledgment by the nominee, is a substantial defect.

2. But the law should be construed liberally, and such nominees be permitted to file a valid acceptance after five days have elapsed, if no other rights have intervened, and nominees should be certified to the county clerks, and their names printed on the official ballots.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, October 20, 1891.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—Your communication of this date, with reference to the nominations of James Glynn, as district judge, and Quitman Brown, as district attorney, in the Thirteenth

Judicial district, as the candidates of the "People's party," and matters growing out of such nominations, has been received, and in reply, I beg to state:

It appears from your communication, that in accordance with the provisions of the election act, approved March 26, 1891, the said nominations were duly certified to your office on September 30, 1891, as independent nominations. It further appears that two letters, or papers, both dated September 30, 1891, one purporting to be signed by James Glynn, and the other purporting to be signed by Quitman Brown, both purporting to be letters of acceptance of said nominations, came to you on October 1st, and were filed in your office; but that neither of these communications were acknowledged, nor was any proof of the execution by the said Glynn or Brown, or other proof of the authenticity of said papers, furnished you.

All these facts have been heretofore certified by you to the various county clerks of the Thirteenth Judicial district, including copies of the so-called "acceptances," and now one of the county clerks asks whether the nominations have been so accepted as to justify him in printing them on the official ballot.

The provision of the statute bearing on this matter, is found on page 148 of the Session Laws of 1891, and is as follows:

"ACCEPTANCES OF NOMINATIONS.—SECTION 14. Every person nominated for any public office, as in this act provided, shall, within five days after the filing of the certificate of nomination paper containing his nomination in the proper office, accept such nomination in a written declaration, signed and acknowledged before an officer authorized to take acknowledgments; the failure of any such nominee to so accept such nomination and file such declaration of acceptance within the time aforesaid, shall be deemed a declination, and such nomination shall be treated as vacant, which vacancy shall be filled as provided for other vacancies herein."

There is no ambiguity about this language; a failure to file an acceptance is to be treated the same as a positive declination; either causes a vacancy in the nomination. This results by operation of law, and not by any act of yourself. A declaration of acceptance which is substantially defective in any respect is wholly invalid, and the same result happens as if no acceptance were filed; that is,

a vacancy. A lack of acknowledgment must be considered a substantial defect. The purpose of the law, evidently, is to protect the people from the expense of printing official ballots for nominations made without the consent of the nominees, or by irresponsible parties, so that it may be known that if any person placed in nomination is elected, he will serve. It is therefore required, in the case of these independent nominations, which may be made without the publicity incident to regular party conventions, that such nominees shall make known their acceptance. When a paper purporting to be an acceptance is filed in your office, it is of the essence of the matter that you have evidence that it is executed by the party placed in nomination. The law, therefore, requires that the acceptance shall be acknowledged. Not only are these acknowledgments omitted, in the cases under consideration, but I understand one of these papers, purporting to be an acceptance, was not handed into your office by the nominee in person, or by any other individual, but came only through the mail, and you have no information that it was in fact sent by the nominee.

In my opinion, therefore, it is clear that there have been no acceptances of nominations, so far, filed in your office, and, so far as any duty is imposed upon you, the nominations are to be considered as declined. Accordingly, had you not yet certified the nominations to the various county clerks in the Thirteenth Judicial district, there would be no obligation on you to do so. Having done so, the original defect follows the certification, and as the matter now stands, it would, in my opinion, not be proper to print the nominations on the official ballot.

Your communication states that these letters, purporting to be from Glynn and Brown, respectively, were *filed* in your office about October 1st. Assuming that they were wholly insufficient, they were not entitled to filing. The filing is an act on your part; the receipt of them by you was merely a tender for filing, the same as though a person had brought to your office some paper and tendered it for filing, whereupon you could have refused to file it, if it was not anything that could be properly filed in your office. While the burden of knowing the law and complying with it is upon the parties who made the tender, and you cannot be expected to examine, before filing, the contents of all papers offered for filing, nevertheless, the act of filing an insufficient paper may have misled parties in

interest, and, therefore, if it be possible to save their rights, the opportunity should be afforded them. This raises questions not directly presented in your communication, but which may grow out of it.

The so-called acceptances being treated as insufficient, the questions arise: First, whether the statutory provision quoted is or is not directory; if it be, then an acceptance might be filed after five days, if within time to comply with all the provisions of the law, and yet have the nominations placed on the official ballots; second, if the provision is not directory merely, then the failure to file an acceptance within the time stated would create a vacancy, and that vacancy must be filled by the parties who made the original nominations, under the other provisions of the law.

These are questions concerning which there may be difference of opinion, and as there are conflicting interests involved, there being other candidates for the same office, it might more properly be decided by some competent court. I am inclined, however, to be of the opinion that the provision is directory, and if the nominee failed to file a valid acceptance within five days, but should thereafter tender it to you for filing before other rights (such as filling vacancy by committees) have intervened, it should be accepted by you and certified down to the county clerks; and if received by the county clerk in time to place the nominations on the official ballot, then it would be the duty of the county clerk to so publish and print the nomination.

I would advise you, therefore, if the matter should assume this shape, to act accordingly, so far as your office is concerned, under all the circumstances laid before me in your communication. If adverse parties should take a different view of the law, and object to such nominations being placed upon the official ballots in any county, they could have their remedy by appealing to the court to restrain the county clerk from printing these nominations.

If additional acceptances be tendered for filing, or filed with you, you should, in making further certificates, be careful to give all the facts and dates, so that there will be a complete record.

As stated at the outset, on the matter as it is now presented, the question is really one for decision by the county clerk, and not by your office. Nevertheless, as the law is a new one, with which the people are, to some extent, un-

familiar, and as it affects an important privilege, viz: selecting officers, I have herein given you my views at length.

Yours respectfully,

JOS. H. MAUPIN,
Attorney General.

The act of the Eighth General Assembly, relating to official reports, does not apply to the report of the Bureau of Horticulture.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, November 27, 1891.

HON. W. B. FELTON,
President State Bureau of Horticulture.

DEAR SIR—I am to-day in receipt of your communication of November 25th, requesting an opinion from me as to whether or not the act of the Eighth General Assembly, in relation to official reports, found at page 263 of the Session Laws of 1891, covers or includes the report of the Bureau of Horticulture, provided for in Sections 4 and 5 of Chapter 52 of the General Statutes.

It is my opinion that the report of the State Bureau of Horticulture is not included in, nor in any manner affected by the law of 1891, which is simply intended to, and does, in fact, amend an entirely different section of the law, to-wit, Section 2 of an act in relation to public printing, approved April 8, 1889. The act in question being limited by its title to an amendment of said Section 2 of said latter act, it cannot, in my opinion, be construed to amend an entirely different section of the statute; and in my opinion, it does not.

There is another and still stronger reason, to my mind, why the act of 1891 cannot be construed to cover the report of the Horticultural Bureau. By reference to Section 2 of said act, as well as to the section of which it is amendatory, it will be observed that the reports therein provided for are the reports of those officers, only, who are required by any law of the State to make reports "to the Legislature or Governor," while the law providing for the report, and authorizing its publication, of the Bureau of Horticulture, requires that the said bureau shall make its report, not to the Legislature or Governor, but "to the Secretary of State."

Hence, for these reasons I am of the opinion that the law of 1891 in no degree affects or includes the reports required to be made by the Horticultural Bureau.

Yours truly,

JOS. H. MAUPIN,
Attorney General.

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1. The act of the Eighth General Assembly, providing for the construction of the ditch in Mesa county, authorizes the Penitentiary Commissioners to sell perpetual water rights, if the estimated cost of such construction is of such magnitude that the sale of annual rights alone will realize an insufficient amount for said purpose, and the board may so stipulate the terms of the certificate issued.

2. And if the estimsted cost of construction of said ditch is equal to, or exceeds, the entire value of its carrying capacity, the board may receive cash subscriptions, and issue certificates therefor, which entitle the holder or holders thereof to the total perpetual carrying capacity of said ditch when completed.

3. The State, by its Board of Penitentiary Commissioners, may still control said ditch, and make the proper assessments for its maintenance; and said board should adopt definite rules and regulations, providing for such control, and fixing the rights of certificate holders.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, January 25, 1892.

HON. CHARLES BOETTCHER,
Chairman Board of Penitentiary Commissioners.

DEAR SIR—On behalf of the Board of Penitentiary Commissioners, you have requested of me an opinion in reference to the powers conferred, and duties imposed, upon said board by an act of the last General Assembly, entitled:

"An act to construct, maintain and operate a State ditch in Mesa county, Colorado, and for the use of unemployed convicts in constructing the same."

The questions propounded concern not only the duties and powers of the board, but are of much importance to the people of the State of Colorado, and in particular to that section of the State known as "the Grand Valley." For fear, therefore, of underrating the weight of some of the questions involved, I will not undertake to summarize them, but will endeavor to treat them fully and explicitly, and in the order asked.

Your first question is as to the authority of the board, under Section 3 of the act, to dispose of certificates upon any subscription other than actual cash.

Section 3 is as follows:

"SEC. 3. It shall be the duty of the Board of Penitentiary Commissioners, after said ditch is surveyed, to issue and sell for cash, certificates bearing seven per cent. interest from the date of the issuance thereof, the principal and interest of which shall be receivable by the State of Colorado as cash, for water to be taken out of said canal, under such rules and regulations as may be adopted by said board and State Engineer and the Governor of the State."

From the reading of which, without reference to other parts of the act, it would clearly appear that in the disposition of certificates, only cash subscriptions could be received by the board; but under the well-established rule, which requires that in construing a law all its parts should be considered together, we find, by reference to Section 6 of the act, that your first inquiry is effectually answered in this language: "The said board shall have the power to receive, at cash valuation, groceries, vegetables, teams, tools, labor and other things necessary in constructing said ditch, on subscription for certificates, as provided in Section 3 of this act."

Your second interrogatory may be very properly subdivided into three parts, involving the questions as to whether or not the board has the power to specify:

First—The amount of water to which the certificate holder will be entitled upon the completion of the ditch.

Second—The prices at which such water shall be sold; and

Third—The length of time such certificate holder shall be entitled to receive said water.

The rules and regulations which the board, with the Governor and State Engineer, are empowered to make, by Section 3, are evidently for the purpose of fixing the relative value of certificates, therein provided for, in water when the ditch is completed. It is equally evident that the power of the board to take cash subscriptions and issue certificates therefor, when paid, is limited in amount only by the amount necessary for the completion of said ditch, and

that the water rights represented by each of said certificates will necessarily be some definite part of the carrying capacity of said ditch when completed.

"*Third*—Has the Board of Penitentiary Commissioners authority to make any agreement to issue a perpetual lease upon the water to be carried by the said ditch, when the same shall be completed?"

The board being specifically empowered to build said ditch by cash subscriptions, and their power to take such subscriptions and issue certificates therefor, when paid, being limited in amount, as above stated, only by the amount necessary to the complete construction of said ditch, if the estimated cost of such construction is of such magnitude that the sale of annual water rights alone will realize an insufficient amount for said purpose, I think the board clearly have the power to stipulate, by the terms of said certificates, that the holder or holders thereof will, when the ditch is completed, be entitled to a perpetual water right therein. The fulfillment of this agreement by the board would be under Section 12 of said act.

"*Fourth*—Has the Board of Penitentiary Commissioners authority to agree to issue certificates which shall have the effect of disposing of the entire amount of water which such ditch will carry, in consideration of guarantees of payment of the cost of the construction of such canal?"

If the foregoing answers to questions 2 and 3 are correct—that is, if the powers of the board are adequate to the performance of the duty imposed upon them, and if the estimated cost of construction of said ditch is equal to or exceeds the entire value of its carrying capacity, when completed, the board may, I think, receive cash subscriptions, and issue certificates therefor, as above stated, which will, in the aggregate, entitle the holder or holders thereof to the total perpetual carrying capacity of said ditch. If the board has this power, I am inclined to the opinion that, by necessary implication, it has the power to accept a guaranty from the holders of said certificates that the money necessary to pay the entire cost of construction will be paid by them in consideration of the issuance of all of said certificates at once.

It is a serious question, however, as to whether or not it is to the best interests of the State to have such certificates so issued and the water thus disposed of in bulk to persons desiring to speculate by its further sale; but this,

I conceive, is a question solely of expediency, and hence one which the board alone can and must determine.

The following are a few of the many considerations supporting the foregoing construction of said act:

If such an arrangement is deemed expedient in other particulars, the early attainment of the obvious purposes of said act are thereby made certain; the completion of the ditch in the near future would be assured, and in consequence, a large area of now almost worthless land would be brought under cultivation, and its taxable value greatly increased; population in that locality would rapidly multiply; valuable improvements would be made; new enterprises of various kinds would be inaugurated, and in many other ways the State at large would be greatly benefited.

In addition to the foregoing, and of equal, if not greater, importance to the people generally, and especially to the laboring element, much of the convict labor of the State, which is now engaged in the manufacture of brick, lime, etc., and which only partially pays the cost of supporting the convicts so engaged, could thus happily be withdrawn from competition with free labor engaged in these industries, and the State could, under such an arrangement, be entirely relieved from the enormous expense of clothing, guarding, feeding and otherwise providing for the maintenance of convicts engaged in the construction of said ditch, and also of a large number of other convicts who are idle for lack of employment affording sufficient remuneration to pay their expenses.

In your fifth interrogatory you direct my attention to Section 2 of the act, and ask:

"Under this section of the statute, has the board of commissioners authority to fix the price upon water in advance of the construction of the ditch; or has it any authority to contract for a perpetual supply and delivery of any given amount of water to be carried by said ditch?"

Section 2 provides that the ditch shall be the property of the State, and all revenue derived therefrom shall be turned into the State treasury. The distinction between the ditch and the water flowing in the ditch must be borne in mind. The State can acquire title to the former; title to the latter can only be acquired by its appropriation to a beneficial use. If the water flowing in the ditch was leased in perpetuity and the right to the water acquired by appropriation by the holders of cash certificates, the title to

the ditch would still remain in the State. The disposition of all the water flowing in the ditch does not deprive the State of the revenue derived from the ditch. Under Section 12, it may still charge for the carriage and delivery of water, and from such charge derive a very considerable revenue. In addition to the charge for carriage and delivery of water, the several water rights may be annually assessed an amount sufficient to defray the expenses of maintenance, repairs, operation, and management.

I have heretofore stated that, without knowing in advance what the construction of the ditch will cost, it would be next to impossible to fix the price of water or contract for the sale and delivery of any specific amount. There is only one way, under the statute, by which it can possibly be done, and that is, to give the aggregate amount of water carried by the ditch to the aggregate number of certificate holders, in proportion to their holdings, subject to such assessment as the board may make. As I have already shown, this the board has power, under the statute, to do; but the question of the wisdom or expediency of so doing must be determined by the board, the Governor of the State, and the State Engineer.

What I have already said as to the authority of the board, previous to the completion of the ditch, to fix the amount of water holders of certificates should be entitled to, sufficiently answers your sixth interrogatory.

"*Seventh*—Has the Board of Penitentiary Commissioners any authority to make any contract by which the entire carrying capacity of said ditch shall be disposed of, so that the State, after the completion of the ditch, will receive nothing from it, and at the same time be compelled to retain the charge, control and management of it, your attention being called to Section 12 of said act, with reference to this interrogatory; and we would also request your opinion of what is meant by the expression, 'may lease water rights,' as contained in said section?"

In answer to this interrogatory, I do not understand that by disposing of all the water the ditch may carry, the State is precluded, under the law, from receiving revenue from the ditch. As I have just explained, there is a distinction between the ditch itself and the water flowing in the ditch. Under no circumstances can the board, in my opinion, dispose of the ditch, or any interest therein. By the express language of the act, the ditch, during its

construction and when constructed, shall be the property of the State, and all revenue derived therefrom shall be turned into the State treasury. No matter how, or on what terms, you may dispose of the water that flows through the ditch, the title to the ditch must remain for all time in the State, unless subsequent legislation divests it; nor does the sale or lease of all the water flowing in the ditch deprive the State of revenue derived from the ditch; and as I have stated above, Section 12 authorizes the board to contract for the carriage and delivery of water, and whatever the revenue may be from such charges, it should be turned into the State treasury, under the language of Section 2. My understanding of the meaning of the expression, "may lease water rights," is that the board may lease, either for years or perpetually, the water to be carried in said ditch.

In compliance with the request contained in your eighth inquiry, I will, later on, if you desire, prepare a form of certificate to be issued for the cash subscriptions, as contemplated by Section 3 of the act.

"*Ninth*—Under the terms of said statute, are the Board of Penitentiary Commissioners authorized to make any contract or agreement of any kind or character whatsoever, with any person whomsoever, which would involve the disposal of perpetual water rights to all of the water to be carried by the said canal when completed?"

It is not only competent, but it is the duty of the board, with the concurrence of the State Engineer and Governor, to make, in advance, definite rules and regulations relating to the issuance and sale of certificates, which shall say what the rights of certificate holders shall be, and upon the faith of which subscriptions shall be invited.

The statute provides that rules and regulations shall be made, and provides for subscriptions. It is manifest that the two must go together, as the subscriptions must be based upon a knowledge of what the rules and regulations fixing their issuance and sale must be.

There is no other theory upon which the object of this statute can be carried out. The rules and regulations are essential, and upon the faith of these rules and regulations the subscriptions are made. To this extent the authority to contract is specifically provided for in the statute.

"*Tenth*—Prior to the construction of said canal, has the board any authority to make any rules or regulations

as to the price of water, and can they issue any certificate other than the one in the form of a receipt for the moneys subscribed, and a statement that the same shall be redeemable in water, upon the completion of such canal, under such rules and regulations as shall be then prescribed, in accordance with Section 12 of said act?"

No time is fixed in this section for making or adopting such rules and regulations. They may be made at any time. The expression, "when said ditch, etc., shall be completed," refers to and fixes the time when the board is clothed with the power to contract for the carriage and delivery of water, and to make leases of water rights. It has no reference to the time of the making of the rules and regulations governing such acts, or fixing the terms of the carriage and delivery, or leasing. While the board cannot to-day contract for the carriage and delivery of water, or make leases of water rights, it can at this time fix and define the terms upon which it will perform those acts, and adopt the rules and regulations by which the board will, when the ditch is completed, be governed in the exercise of the enumerated powers.

It is my opinion that the rules and regulations governing the terms upon which leases of water rights will be made when the canal is completed, should be adopted at the outset, and subscribers advised as to what their general rights shall be.

"*Eleventh*—In your opinion, does the act in question contemplate the annual leasing of water rights, at prices to be fixed by the board, or does it contemplate a sale of perpetual water rights? And is there, in your judgment, any difference between a sale of perpetual water rights and a perpetual lease of water rights; if so, in what would such difference consist?"

In my opinion, if the Legislature had intended to limit the right of the board to the annual leasing of water rights, it would have so stated. It made no such limitation. The Legislature has given the board the authority "to lease water rights," and that authority, therefore, is coextensive with the widest meaning of this term. It is well known that there may be a lease in perpetuity, or "so long as water shall flow." The only limitation which is involved in the use of the term, "lease," as I understand it, is that there should be a periodical payment, annual or otherwise, in consideration of the right so granted.

A sale of perpetual water rights may mean something very different. It may mean the conveyance of a right which is subject to no annual assessment, or other assessment whatsoever. The terms, it is true, are sometimes used interchangeably. The Legislature, by confining the expression, "lease of water rights," necessarily convey the idea of periodical payments, in the nature of assessments or otherwise.

Very respectfully

JOS. H. MAUPIN,
Attorney General.

An act making an appropriation for the "relief of certain laborers who have performed work on the capitol building," was intended to compensate those who performed manual labor for the State in the construction of said building. The money thus appropriated cannot be applied to the payment of claims of contractors.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, January 27, 1892.

To the Honorable, the Board of Capitol Managers:

You ask my advice relating to the claim of King & France, submitted to you for allowance under an act of the last General Assembly, by which $5,000 was appropriated out of the capitol building fund for the payment of laborers who performed labor on the capitol building during the time when one Richardson had the contract for building the same, and who afterward, by reason of insolvency, failed to pay said laborers. The aforesaid claim of King & France is for the sum of $1,345.55, and claimants state, in their application, that their demand is for hauling done during the latter part of the month of September and greater part of the month of October, in the year 1887; and that they were "employed by W. D. Richardson, etc., to haul all the stone, etc., from the U. P. R. R. Company's tracks to the capitol building grounds, at fifty-five cents per ton, and to haul all the required sand from Cherry creek to the capitol building grounds, at the rate of forty-five cents per cubic yard." They further recite that their voucher for each load of material so hauled is filed with their application. An examination of such vouchers shows that, without exception, the loads for which they were issued were hauled by persons other than King & France, or either of them, such persons evidently being teamsters employed by said firm.

The act upon which said claim is presented, in its title recites that it is to "provide for the relief of certain laborers who have performed work on the capitol building." The preamble recites that "said laborers, on account of the failure of said Richardson to comply with his contract and his insolvency, have not been paid." And Section 1 of the act empowers the Board of Capitol Managers "to audit the claims of laborers, and allow each of said laborers the just compensation" due from said Richardson, etc. From which it clearly appears that the intention of the Legislature was to provide for the relief of "laborers," and no other class of persons is provided for in said act. Therefore, the right of the claimants herein to payment, by virtue of said act, depends wholly upon whether the facts above recited constitute them laborers within the meaning of the act.

It is a familiar rule of construction, that the language of an act of the Legislature must be given its plain and ordinary meaning. Webster's definition of the word, "laborer," which is adopted by several law dictionaries and a number of courts, is: "one who labors in a toilsome occupation; a man who does work that requires little skill," etc. The law books define the word to mean "one who gains a livelihood by manual toil; one who depends on hard work for a living." (And. Law Dic., page 592, and authorities cited.)

In accordance with these definitions, the courts have almost uniformly held that the word, in statutes providing for the relief of laborers, or for laborers' liens, etc., means those who are engaged in manual labor only. This was the construction given to the older English statutes, which provided for the rating of all "laborers, weavers, spinsters," etc. (1 Jac. Ch., 6.) In like manner, in an early case in the State of Ohio (Bloom vs. Richards, 2 Ohio St., 401), the court say that "by nothing short of the most strained and unreasonable construction, could the mere making of a contract be brought within the meaning of either of the definitions of the word laborer. The idea of toil, of that which produces weariness, is inseparable from the idea conveyed by the word labor."

The Supreme Court of Pennsylvania, in Pennsylvania, etc., R. R. Co. *vs.* Leuffer, 84 Pa., 171, says that, ordinarily, the term applies to "such as gain their livelihood by manual toil; . . . those who are engaged, not in head, but in hand work, and who depend upon such hand work for a living."

In the same State, Jones *vs.* Shawhan, 4 W. & S., 257, under a mechanics' lien law providing for laborers' liens, the courts say that "one who furnishes nothing but his superintendence as an undertaker has no right to file a lien in pursuance of his contract as such." To the same effect are the decisions of the Supreme Court of Michigan. In Rockway *vs.* Innes, 39 Mich., 47, it was held that an assistant chief engineer of a railroad company, and in Peck *vs.* Miller, 39 Mich., 594, that a contractor for building the bed of a railroad, were not "laborers," within the meaning of the provisions of a statute rendering stockholders liable for labor debts.

In Whitaker *vs.* Smith, 81 N. C., 340, it was held that a farm overseer was not a laborer, within the meaning of such statutes. Numerous other cases might be cited, showing the distinction between "laborers" and persons by whom they are employed or directed, the courts frequently stating, in effect, that the main if not the only object of such statutes is "to secure persons whose wages are not usually very large, and whose means are not generally such that they can avoid suffering unless they are secured, and that for the reason that such persons have not the same knowledge of business or command of resources as contractors, and are much less able to protect themselves in advance by proper measures of precaution against loss."

But perhaps the case most nearly parallel to the one under consideration is Wentworth's Appeal, 84 Pa. St., 569, in which the court say that "one who performs a contract to deliver lumber, by hiring teams and drivers, is not a laborer within the meaning of . . . ;" an act giving priority to labor debts. The court further say: "The act was intended to favor those who earned money by the sweat of their brows, not those who were mere contractors to have the work done, and whose compensation was the profit they would realize out of the transaction."

The application for the claimants in this case shows that they had the contract for hauling all the stone, from the U. P. R. R. Co.'s tracks, and all the sand required, from Cherry creek to the capitol grounds, and the evidence presented by them in support of their claims shows that the labor of hauling was performed by teamsters employed by them.

It is, therefore, my opinion that they are not included in the class of persons provided for in said act, and that it is your duty to reject said claim.

Respectfully,

JOS. H. MAUPIN,
Attorney General.

The law recognizes a claim against the State in favor of Fish Wardens appointed, and who have rendered services according to law; and there being no available appropriation to pay the same, they are entitled to certificates of indebtedness.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, January 30, 1892.

HON. GORDON LAND,
State Fish Commissioner.

DEAR SIR—Several days since, I received a communication from you asking this question: "Are the game and fish wardens State officers to such an extent as to entitle them to have certificates of indebtedness issued to them for services rendered?"

From the form of this question, I presume you labor under the impression that certificates of indebtedness for services rendered to the State cannot be issued to any persons but State officers. I do not so understand the law; but the contrary, I think, clearly appears from the statute quoted below. The law providing for the appointment of district game and fish wardens was passed by the Eighth General Assembly. There are, by this law, four districts created; and it is made the duty of the State Game and Fish Warden, as soon as practicable after the passage of this act, to appoint a district game and fish warden for each of said game districts.

Section 4 of the act provides that the district game and fish warden shall receive as compensation the sum of $1,200 per annum. In the absence of an available appropriation to pay any part of these salaries, the question arises, are they, under the law, entitled to any evidence of indebtedness on the part of the State. Section 1382 of the General Statutes provides that "in all cases where the law recognizes a claim for money against the State, and no appropriation shall have been made by law to pay the same, the Auditor shall audit and adjust the same; and when the same shall have been approved by the Governor and Attorney General, he shall give the claimant a certificate of the amount thereof, under his official seal, if demanded."

While the last General Assembly intended, and attempted by law, to appropriate the money necessary to pay the salaries of the several game and fish wardens, it transpires that, by reason of the late date of its taking effect, the said law is wholly inoperative, because the State revenues applicable to the purpose have been exhausted in

the payment of prior appropriations. The said law is, therefore, according to the decision of our Supreme Court, in the case of *In re* Appropriations, 13 Colo., 316, a nullity, and the rights of said wardens are the same as if no appropriation had been made at all.

The only question is, then, do the laws recognize a claim for money against the State in favor of these wardens? I am of the opinion that they do, and that there is no reason why they should not receive certificates of indebtedness for the aforesaid services rendered by them to the State. Very respectfully,

JOS. H. MAUPIN,
Attorney General.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, February 1, 1892.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—Referring to your communication of the 30th ulto., asking to what fund the money received as interest on deposit of State funds belongs, or what disposition should be made of it, it is my opinion that the interest should be turned into the general fund, for the respective fiscal years in which the interest is earned.

Very respectfully,
JOS. H. MAUPIN,
Attorney General.

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1. The authority of all public officers is limited and confined to the territory over which the law, by which they claim, has sovereign force.

2. The insurance law of this State does not empower the Superintendent of Insurance, nor his appointee, to investigate insurance companies beyond the limits of this State.

3. Extra territorial power is not derived from the statutes, unless given in express terms.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, March 5, 1892.

HON. J. N. CARLILE,
State Treasurer.

DEAR SIR—You inform me that the deputy superintendent of insurance demands of you a statement of your

reasons, in writing, for refusing his warrant for expenses incurred by him in traveling to Memphis, Tennessee, for the alleged purpose of investigating an insurance company having its principal office in that city, but doing business in this State; and you therefore ask me to formally assign the reasons heretofore verbally stated to you, upon which you based your action of refusing to pay said warrant. The law does not require you to give written reasons for your official conduct, but no doubt your moral obligation to fairly explain such conduct, for the purpose of maintaining harmony between your and other departments of the State government, is ample foundation for your desire to comply with said request.

The statute, as I am informed, by which the insurance department claims the authority to travel to other States and countries, at the expense of this State, for the purpose of investigating or overhauling the affairs of foreign corporations doing business in this State, is as follows:

"The Superintendent of Insurance shall have power to examine and inquire into all violations of insurance law, and may at any time examine the financial condition, affairs, and management of any insurance company incorporated by or doing business in the State, and inquire into and investigate the business of insurance transacted, and may require any company, its officers, agents, employés, or attorneys, or other person, to produce, and may examine, all its assets, contracts, books, and papers; may compel the attendance before him, and may examine under oath, its directors, officers, agents, employés, solicitors, attorneys, or any other person, in reference to its condition, affairs, management, or business, or any matter relating thereto; may administer oaths, or affirmation, and shall have power to summon and compel the attendance of witnesses, and to require and compel the production of records, papers, contracts, or other documents, by attachment, if necessary; and shall have the right to punish for contempt, by fine or imprisonment, or both, any person failing or refusing to obey such summons or order of said superintendent. The said superintendent may make and conduct such examination in person, or he may appoint one or more persons to make such examination for him." . . .

The remainder of the section gives the superintendent or his appointee, or appointees, additional facilities for conducting such examination, and provides a punishment of

not exceeding $500.00 fine for any person refusing to obey his process or answer questions; and a fine of not exceeding $1,000.00, or imprisonment of not less than two months in the county jail, nor more than five years in the penitentiary, for any person who shall, with the intent to deceive the superintendent, or his appointee, in such examination, falsify any statement, exhibit, etc., submitted, filed in the department, or used in the course of any examination. It will be observed that the Legislature has not, in that part of the law quoted, and in no other part of the insurance law of the State, undertaken, in express terms, to empower the said superintendent, or his appointee, to do any of the acts above mentioned, outside the State of Colorado.

"The authority of public officers being derived from the law, it necessarily follows that the authority cannot exist in places where the law has no effect. The authority of all public officers is, therefore, limited and confined to the territory over which the law, by virtue of which they claim, has sovereign force . . . . Thus, a State officer can exercise no official authority beyond the confines of the State."

Mechem on Pub. Officers, Sec. 508, and cases cited.

In the construction of the statute under consideration, I think that it is but a fair estimate of the intelligence of the General Assembly, to assume that they knew that they could not invest the Superintendent of Insurance, or his appointee, with any power to compel the production of papers, or attendance of witnesses, to punish for contempt, etc. (without which he might be impotent to discharge the duties imposed upon him in cases in which investigation is most needed), or to do any other official act in any other State or country than the State of Colorado.

It is true that persons are sometimes empowered by statute to do acts, such as the authentication of documents, which is made valid by such statutes, and agents of the State, appointed according to law, are sometimes empowered to make contracts and transact business for the State, whose acts create an obligation which the law of the State recognizes, but no such extra-territorial power is ever derived from the statutes, unless given in express terms.

Jackson *vs.* Humphrey, 1 Johns (N. Y.), 498;
Chandler *vs.* Hanna, 73 Ala., 390.

But the powers last mentioned are wholly different in character from those claimed by the insurance department,

and before mentioned, inasmuch as their purpose is not to coerce the action of any citizen or corporation of another State or country within the territory of such State or country. The futility and absurdity of legislation for such purpose would fully appear upon an attempt to execute it, for who would serve the process of the superintendent, or his appointee, in the city of New York, or London, or Berlin, or any other place except in Colorado; or who, anywhere else, would have regard for the penalties for disobedience imposed by our statutes? We must conclude, therefore, that the investigation or inquiry by the superintendent, contemplated by law, is an official investigation within the State; that no other investigation or inquiry is official or authorized by law, and that no proper charge against the State treasury, by a supposed investigation of the character last named, can be made.

It is not a sufficient answer to the foregoing reasons, that the usefulness of the insurance department is "greatly crippled" if its power of visitation, investigation, and the necessary associate powers of compulsion, etc., are limited in their exercise to the State of Colorado, for the power of the Legislature is limited to the same territory.

It might be quite desirable to afford citizens of this State redress for numerous wrongs against them by citizens of other States or countries, committed while in those States or countries, by remedies prescribed by our General Assembly, but it could not be done, for our General Assembly has no such power; and when it has enforced penalties, such as forfeiture of charter of companies, or of fine and imprisonment of their officers or agents found within the State, when they refuse to obey the law, its power to enforce the insurance law of the State is exhausted, though not less than its power to enforce any other law.

But you say that the insurance department contends that you have no discretion in the premises, but that "all claims [quoting another part of the same statute] arising under such examination, upon approval by the Superintendent of Insurance, shall be paid by the State Treasurer, out of the insurance fund, on warrants issued by the deputy superintendent of insurance," and that this language is intended to empower the Superintendent of Insurance to pass finally on his own claim against the State. "It is a principle of great importance and quite general acceptance, that no officer shall act as such in a matter in which he is personally interested as a party."

Mechem on Pub. Affairs, Sec. 524.

If it was intended by the Legislature to disregard this principle, as the above language appears to indicate, there is another principle applicable to all officers vested with discretion; which is, that such discretion must be soundly exercised.

I have heretofore advised you, on the authority of the case of *In re* Appropriations, 13 Colo., 316, that if in any case a warrant has been issued in payment of a demand which you know to be illegal in character, you should refuse to pay such warrant; but that where the demand is such in character as may be lawfully paid, you have no right to interfere with the State Auditor's discretion in passing upon the amount due, or in other particulars. The claim under consideration, however, is not adjudicated by the State Auditor, as such, but by him in his *ex officio* capacity of Superintendent of Insurance, and as before stated, as judge in his own case. While it is by no means herein intimated that any improper claim against the State would be willfully approved by him, yet if his discretion were wholly without limit or supervision, any superintendent who was indiscreet or dishonest might approve a claim for expenses incurred by a trip by himself or any appointee, to any part of the United States, or to Europe, for any purpose; and if you can exercise no discretion in the matter, there can be no correction of even the greatest mistakes, or prevention of the grossest corruption on the part of any superintendent of insurance, acting under the present law.

The foregoing are the reasons why I have heretofore advised you to refuse to pay the first aforesaid warrant, or any other warrant presented by the insurance department which you know, or clearly believe, to be illegal.

By choosing this course, the State will, no doubt, lose far less in time to come by payment of costs of litigation in cases in which you may happen to be mistaken, than by your choosing the more dangerous alternative of payment, without scrutiny or examination, of all warrants presented.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

N. B.—The correctness of the statement of law contained in this opinion is affirmed by the Court of Appeals, in the recent case of Hurd *vs.* Carlile.

1. The opinion given to the State Treasurer, on the same subject, reiterated.

2. Some suggestions given as to the discharge of the duties of the Superintendent of Insurance, under the law, as construed in the two opinions.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, March 10, 1892.

HON. JOHN M. HENDERSON,
Superintendent of Insurance.

DEAR SIR—I am in receipt of a letter from the Insurance department, by your deputy, Hon. Nathan S. Hurd, requiring of me legal counsel to aid him in the discharge of his official duties, which, he intimates, is rendered more difficult by a construction of the law, relating to the same, given in a recent opinion from this office to the State Treasurer.

I confess that it is not easy for me to see a necessity for additional exposition of said law. It appears to me that the statute in question is remarkably explicit; and it is a familiar rule of construction, that an officer vested with statutory powers can exercise only such as are granted expressly, or by necessary implication. Section 10 of the insurance law, quoted in said letter, makes it your duty to examine and inquire into all violations of insurance law, and gives you power at any time to examine the financial condition, affairs, and management of any insurance company incorporated by or doing business in this State, and inquire into and investigate the business of insurance transacted; and you may require any such company, its officers, agents, employés, or attorneys, or other person, to produce, and may examine, its assets, contracts, books, and papers; and may compel the attendance before you, and examine under oath, its directors, officers, agents, employés, solicitors, attorneys, or other person, in reference to its condition, affairs, management or business, or any other matter relating thereto, either at your own office or at the principal office of such company, within the State, or other suitable place within the State.

The same section gives you ample power to compel the obedience to process requiring the attendance of such persons, and the production of all books, papers, exhibits, etc., necessary for the purposes of such examination, since it gives you power to punish for contempt by both fine and imprisonment, and does not limit your discretion as to the

amount or severity of such punishment. It further makes it a felony for any "director, officer, manager, agent, or employé of any insurance company, or other person, to make any false certificate, entry, or memorandum, upon any of the books or papers of any insurance company, or upon any statement or exhibit filed, or offered to be filed or used, in the course of any examination or investigation, with intent to deceive the Superintendent of Insurance."

It thus appears that the Legislature has given you all the power, and has fixed sufficiently severe penalties for disobedience to your process or the law, to compel the officers, or other persons conducting the business of foreign companies in the State, to furnish all the information necessary for a complete investigation of the affairs of such companies. The power thus conferred upon you is greater in some particulars than the power given, for similar purposes, to any court in the State; and I repeat, that the Legislature, for the protection of the people, clearly intended that your duties should be performed within the State, where the law makes your work efficient, and not in other States or countries, where you would have the right to examine only the exhibits voluntarily submitted to you by the companies which you desired to examine. In the latter case, companies doing a fraudulent business would not voluntarily suffer exposure, and would either repel any attempted examination or, more probably, would exhibit their resources and conceal their liabilities, and thus wholly mislead the person desiring to make the investigation.

But if the powers given you by statute are insufficient, neither the Legislature nor you, nor I, are to blame for it. The chafing against limitation of authority by the most despotic potentate is of no consequence beyond his own dominions.

Thus far I have stated, in a different form, what was contained in the aforesaid opinion to the State Treasurer. But the letter from your department indicates, by specification of facts to be ascertained, the character of advice desired of me, as follows:

"*First*—How and where the capital stock of these companies is subscribed, and in what amounts; whether paid in cash or stock notes given; whether taken wholly by the officers and directors, and held by them as a close corporation, or whether the stock is held by parties not connected

with the management of the company; whether the capital is invested in accordance with Section 7, Chapter II. of this act.

"*Second*—The market value of real estate owned by the company; the value of improvements on the same, and whether encumbered or not; the amount of insurance, and in what companies placed.

"*Third*—The par and market value of all stocks and bonds owned by the company; such valuation to be made by competent and reliable persons not connected with the company; and if the bonds are of a local character, the valuation of the property on which said bonds are predicated.

"*Fourth*—The par and market value of all securities pledged for loans; the amount the company has loaned on each item; whether the amount is within our statutory limitations, and whether the collateral is such as would be accepted by this department.

"*Fifth*—Cash in the hands of the company and deposited in banks to the credit of the company.

"*Sixth*—The amount of interest due and accrued on the company's stocks, bonds, and other investments.

"*Seventh*—Gross premiums, in course of collection, not more than three months due.

"*Eighth*—Bills receivable, not yet due, taken for marine and fire risks.

"*Ninth*—To make a personal examination of all other property belonging to the company, and ascertain the aggregate amount of the company's assets, computed at their actual value.

"*Tenth*—The amount of all the liabilities of the company, including losses adjusted and unpaid, losses in process of adjustment, losses resisted, and the cause of the same being resisted. Amount of unearned premiums, computed as one, two, three, four, five years' business. Also, all liabilities on perpetual fire risks. Dividends on stock remaining unpaid. Due for salaries, rents, advertising, and other miscellaneous expenses. Due for borrowed money and all other demands against the company, which may be charged up as a liability.

"*Eleventh*—Total amount of all risks in force and premiums paid on same.

"*Twelfth*—Recapitulation of all risks, by years, and the amount of earned and unearned premiums on same.

"*Thirteenth*—The business standing, integrity and worth of all the officers and managers of the company.

"*Fourteenth*—The manner in which the securities of the company are kept, and whether sufficient caution is exercised to at all times protect the company from loss."

I do not find such an enumeration anywhere in the law, but I do not doubt that you, or your deputy, conscientiously believe that such is a statement of the duties of investigation imposed upon you by law.

The compulsory methods available for the purpose of ascertaining such facts, are fully set forth in the insurance law, and, I presume, have been already sufficiently discussed. All that remains further of the inquiries made by said letter relates to sources of information of the facts desired.

Such are not strictly legal questions, and I have no doubt can be satisfactorily answered by any person familiar with the business of such corporations and the character of property owned by them; and the following suggestions are made for the sole purpose of complying with your request, knowing that you can receive more valuable assistance from other persons. I will say, generally, that the exhibits, books, papers, etc., which you can compel such companies to produce before you, and the sworn testimony of their officers, agents, etc., are competent evidence of the facts sought to be ascertained by you, and that if there is no discrepancy between the showing thus made by any company being investigated, and its representations as to the same facts, made by publication, to procure patronage from the public, you will generally be safe in concluding that such showing is correct.

If you think that such company, by its officers, agents, etc., misrepresent such facts, named by you in order:

First—Examine the law of the State or country where such corporation is authorized to begin and do business, and if such law has been and is faithfully enforced, you can, of course, assume the existence of the conditions upon which such company can lawfully begin or continue to do business.

Second—A number of insurance companies doing business in this State own valuable real estate in every large

city in the Union, and perhaps in other parts of the world, and I presume you would find it no easy task to ascertain, unaided, the value of the real estate owned by some of said companies in the city of Denver alone. You will, therefore, be limited to an approximate determination of values of real estate, by considering the statements of such companies, made for both purposes above mentioned, and such other information as you can conveniently obtain.

Third and fourth—You can ascertain the market value of bonds and other securities by consulting the Denver daily papers, in the columns giving prices of such property, for the preceding day, in New York; or if their reports are incomplete, procure some publication specially devoted to news of this character.

The facts numbered from fifth to fourteenth, inclusive, you must ascertain from the evidence afforded by the exhibits produced by such company, upon request or by your compulsory process, as above explained, and any other reliable information which you can otherwise obtain.

I do not think you should be blamed if you fail to scent the insolvency of a foreign company before it is discovered in the jurisdiction where it has its principal office; and it is no just reason for complaint if you do not, at all times, know the precise condition of each of the 240 insurance companies doing business in the State. The late investigation of the New York Life Insurance Company, by the superintendent of that State, occupied the entire time of a large corps of experts for (as I remember) five months. The law of this State clearly contemplates such supervision over foreign companies as you can exercise with the powers and resources given you, and that some dependence can be put upon the integrity of insurance law and fidelity of officials, whose duty it is to enforce the same in other States.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

An act creating the State Home and Industrial School for Girls, construed.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 8, 1892.

HON. WM. H. BRODHEAD,
Secretary State Board of Charities and Corrections.

DEAR SIR—You ask me the following question: "Will you kindly inform this board what sections of the act

creating the State Home and Industrial School for Girls, page 279, Session Laws of 1887, are operative under the provisions of Section 13?"

In reply, permit me to say, that it is my opinion—

First—That Section 12 of said act does not become operative until the buildings for the institution named have been erected.

Second—That the last clause of Section 5 of said act does not have the effect of regulating or restricting the right of any institution with which the board contracts, under said Section 13, to employ persons of either sex, solely for its own purposes.

Third—That all the remaining sections and parts of said act are operative under the conditions named in said Section 13, upon condition, of course, that the rules and regulations adopted by the board shall, under all existing circumstances, be reasonable and general in character.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

An oath is not required of an inferior civil officer, before entering upon the discharge of his duties, unless prescribed by statute.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 11, 1892.

HON. E. J. EATON,
Secretary of State.

DEAR SIR—Several weeks ago I advised you, orally, to the effect that every inferior civil officer, designated either in the Constitution or statutes, not specially exempt therefrom, should, before entering upon the duties of his office, take an oath to support the Constitution of the United States and of the State of Colorado, and to faithfully perform the duties of his office.

This advice was based upon Section 8, Article XII. of the Constitution. Recently, I have given this section a more critical examination, and have examined, with much care, such authorities as tend to throw light upon the subject, and in particular, the case of School Directors *vs.* The People, 79 Ill., 511, which seems to me to be a well-reasoned case. Upon the authority last mentioned, I am now of the opinion that I have heretofore been in error in regard to

this question, and that the section of the Constitution referred to is not self-enforcing, and that in the absence of a statutory enactment requiring it, an oath need not be taken by an inferior civil officer before entering upon the duties of his office.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The law making an appropriation to pay laborers on the capitol building, construed and applied to the cases submitted.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, September 8, 1892.

To the Honorable, the Board of Capitol Managers:

You refer to me, for advice, the claims of James Fitzgerald, Albert Schulz and Frederick A. Jackson, for payment out of the appropriation made by the last General Assembly to laborers who performed labor on the capitol building, under employment of W. D. Richardson, who failed to pay his said employés, on account of his insolvency.

1. The affidavit of Albert Schulz recites that he was employed as superintendent of work on the building; but from other evidence on file with the records of the board, it appears that he acted in the capacity of architect and draftsman. There appears also to be some controversy between him and the board concerning certain drawings, which the board insists are the property of the State, and are wrongfully detained by said Schulz; but I think it is not necessary to decide this controversy in order to decide the merits of his claim.

2. The affidavit of Frederick A. Jackson recites that his assignor acted as clerk, and the claim is wholly for services rendered in this capacity.

For the purpose of determining the rights of the claimants mentioned, you are respectfully referred to an opinion from this office, given at your request, January 27, 1892, and construing the statute upon which said claims are based. Said opinion is to the effect that the purpose of said appropriation was to afford compensation to the laborers employed by said Richardson, for wages earned by them, and lost as above stated; and that the term,

"laborer," includes only that class of employés who performed manual labor, and not those whose services were in the character of giving direction to manual laborers, or other mental work. It is obvious that this construction of the statute excludes from its benefits all claims of the character of the two just mentioned, and that if you apply this construction, as you have done in all cases since said opinion was rendered, you will reject the two aforesaid claims.

3. As to the claim of Fitzgerald, there is not sufficient evidence submitted to me to enable me to decide to which class of services it belongs.

His affidavit shows that he was foreman of a certain force of stonecutters, but does not show whether he labored with the men under his direction, or only directed them in their work. If he performed manual labor with them, it is quite consistent with the foregoing views to allow him the usual wages for that kind of work, but to refuse to pay him the excess of ordinary wages which, by his contract of employment, he might be entitled by reason of his acting in the capacity of foreman or director of other workmen.

4. It may be well to add, that the board may, in its discretion, pay Mr. Schulz for the drawings above mentioned, out of the general fund, upon their being surrendered to the board.

Respectfully submitted,

JOS. H. MAUPIN,
Attorney General.

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1. Ordinarily, the word "improvement" embraces every addition, alteration, erection or annexation which renders land more profitable or useful.

2. But improvements contemplated by the law relating to State lands, and the lessees thereof, should conform strictly to the character of the land and the purposes of the lease.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, September 10, 1892.

HON. MATT. FRANCE,
Register State Board of Land Commissioners.

DEAR SIR—In your letter of recent date, you submit for my consideration, and for an opinion from me thereon, several questions relating to improvements upon lands belonging to the State, and as to the manner of appraising

same, which said improvements have been or may be placed there by lessees, under leases for farming, grazing, or other purposes. I will endeavor, briefly, to answer the questions satisfactorily, but generally, without special reference to any particular question asked.

The law governing improvements on State lands and fixing the price to be paid therefor is exceedingly meagre and indefinite. In Section 11 of an act creating the office of Register of the State Board of Land Commissioners, to prescribe the powers and duties of said Board, and providing for the lease, sale, and management of State lands, and repealing other acts on the same subject, approved April 2, 1887, it is provided: "Should anyone apply to lease any lands belonging to the State, upon which there are improvements belonging to another party, before the lease shall issue, he shall file in the office of the State Board of Land Commissioners a receipt showing that the price of said improvements, as agreed upon by the parties or fixed by the State Board, has been paid to the owner in full, or shall make satisfactory proof that he has tendered to such owner the price of said improvements, so agreed upon or fixed by the board."

In Section 14 of the same act, as amended in 1889, it is provided that "if any land be sold on which surface improvements have been made by the lessee, said improvements shall be appraised under the direction of the State Board. When lands on which improvements have been made as above, are sold, the purchaser, if other than the owner of said improvements, shall pay the appraised value of said improvements to the owner thereof, taking receipt therefor, and shall deposit such receipt with the State Board before he shall be entitled to a patent or certificate of purchase."

It is difficult to define "improvements," under this act, or to enumerate what improvements shall be appraised and paid for, or how far a tenant is safe in placing improvements upon the State lands leased by him; nor is there, as to improvements, any distinction made by the act between the different classes of leased lands. Ordinarily, the word "improvements" embraces every addition, alteration, erection, or annexation made by lessees to render the premises more valuable and profitable or useful. It is a more comprehensive word than "fixtures," and necessarily includes the latter and such additions as the law might not regard

as fixtures. Indeed, it would be difficult to select a more comprehensive word; and when used, it is difficult to say what, if anything, would be excluded.

Bouvier defines improvements as "an amelioration in the condition of real or personal property, effected by the expenditure of labor or money, for the purposes of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purpose."

"Improvement is an amelioration in the condition of property by the outlay of labor or money." (Anderson's Law Dictionary.)

"Improved land is such as has been reclaimed, is used for purposes of husbandry, and is cultivated as such." (Anderson.)

As applied to improvements on land leased from the State, these definitions are, I think, too broad and liberal, at least so far as placing the right in a lessee to have his improvements appraised and paid for upon his surrendering to the State the leased lands. In my opinion, improvements placed upon State lands by a lessee should conform strictly to the character of the lease held by him, and only such work, necessary and useful in conducting the particular business for which the lands are leased, should be appraised and paid for. The rental value on grazing land, for instance, is fixed much lower than the land leased for farming purposes, and improvements on the latter would necessarily be more numerous and valuable than on the former; and a lessee of mining property would require altogether a different class of improvements from either of the other two.

It would be impossible to enumerate precisely what improvements should be appraised upon either of these classes of lands. In a general way, it would be safe to say that a tenant under a grazing lease would be justified in fencing the land, and, perhaps, in building necessary sheds and corrals for the purpose of gathering and protecting stock; but the erection by him of a residence house, barn, or other out-houses, or the planting of trees, either fruit, shade or ornamental, should be at his own risk, and without expectation of appraisement or remuneration. On the other hand, it would be natural and proper for an agricultural tenant to erect a residence house, barn, out-houses, build fences, plant trees, vines, etc., and expect, upon sale of the land by the State Board of Land

Commissioners, or upon leasing to another party upon termination of his lease, a reasonable price for all such improvements; and the appraiser should not hesitate to allow the full value thereof, when satisfied that they were placed thereon by the tenant in good faith, for the purpose of benefiting, and are a benefit to the land, and are reasonably proportioned to the amount and value of the land leased. I am of the opinion that clearing the ground of brush, stones, etc., or first breaking of the same, are improvements to be appraised and paid for; so also would the setting of ground to alfalfa or other permanent grass be an improvement. The value of such improvements as the foregoing can easily be determined. The sinking of wells, erection of wind-mills and tanks may become improvements, if necessity therefor exists. Water rights are an improvement to both grazing and agricultural lands, and the application thereof to both should be encouraged by the State; and ditches and laterals are of the same character.

I believe the foregoing is a sufficiently comprehensive reply to all your questions to enable the appraiser, and all persons concerned, to determine and adjust the rights of lessees in all ordinary cases. If, however, it is found to be unsatisfactory in any case, I shall, of course, be pleased to render any further assistance that you may desire.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The Constitution has put it out of the power of the General Assembly to relieve insurance companies from taxation on property of any class, when other owners of such class of property must endure the burden of such taxation.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, November 15, 1892.

HON. N. S. HURD,
Deputy Superintendent of Insurance.

DEAR SIR—You submit to me a letter from the district attorney of the Twelfth Judicial district, addressed to the manager of an insurance company in this city, relating to a dispute between the commissioners and treasurer of Rio Grande county and certain insurance companies, involving the right of said county to collect certain taxes assessed

against said companies by the proper authorities of said county.

You inform me that the proper solution of the question concerns every county and insurance company in the State, and that you believe it to be your duty to the said companies and the fiscal officers of the counties, to obtain from this office, and give them, a construction of the law applicable to the matter in controversy.

In connection with your request, you site Section 12 of the insurance law, which prescribes in detail the fees that every company doing business in this State must pay, and by its last clause further provides that "insurance companies shall not be subject to any further taxation, except on real estate and the fees provided in this act." It is by virtue of the clause quoted that the companies claim immunity from the taxation before mentioned; and if it is valid law, it certainly appears to be conclusive in their favor.

But Section 3, Article X. of our State Constitution, provides: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal;" and Section 10 of the same article further provides that "all corporations in this State, and doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax."

I think no comment on this language can make its meaning any plainer, and that its evident purport is: That any real or personal property owned or used by the aforesaid insurance companies, in any county of this State, is subject to taxation for all the purposes named in the Constitution, the same as if it was owned or used by any other corporation, or any person in such county, and that the Constitution has placed it beyond the power of the General Assembly to relieve insurance companies, or anyone else, from uniform taxation upon property of any class, when other owners of such class of property must endure the burden of such taxation.

I have not mentioned any specific kind of taxable or untaxable property, for the reason that all parties con-

cerned are probably more familiar with the classification of property for such purposes than I am, and I think that they can find no difficulty in applying the law above stated to any case.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

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1. The Attorney General is not warranted in advising the Auditor not to draw warrants upon proper requisitions of the officers of State institutions supported by a one-fifth and one-sixth mill tax.

2. There being no appropriation by the last General Assembly for the insurance department, the Auditor is not authorized by law to approve any warrant or claim presented by said department.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, November 29, 1892.

HON. JOHN M. HENDERSON,
Auditor of State.

DEAR SIR—1. In your letter of the 23d inst., you, in view of the recent construction by the Supreme Court—in the case of the Mute and Blind Institute *vs.* Henderson, Auditor—of Section 33, Article V. of the Constitution, ask me whether or not you shall audit accounts presented by the State institutions supported by one-fifth and one-sixth mill tax, and the insurance department, which is supported by fees, which, when paid into the State treasury, constitute an insurance fund from which all expenses of the department must be paid.

2. The article named is: "No money shall be paid out of the treasury except upon appropriations made by law, on warrants drawn by the proper officer in pursuance thereof." And the language of the court, touching the same, is: "Under this provision, when money has been actually paid into the State treasury, a statute providing for its payment, other than by appropriation and warrant, is void. No argument is needed to demonstrate this. The language employed admits of no other construction." It is clearly intimated in *In re* Appropriations, 13 Colo., 324–6, and expressly stated in People *ex rel. vs.* Spruance, 8 Colo., 535, that in order to impose a legal duty on you to draw your warrant for any purpose, there must be a specific appropriation for such purpose made by each successive legislative assembly, if, of course, such purpose continues with

said successive Legislatures. If there were no other authority on the subject than thus far quoted, I think I should be compelled to say that the setting apart, by general statute, of one-fifth or one-sixth mill tax for the support of the several State institutions is not an appropriation for their support, such as is contemplated by the Constitution. But the Spruance case, in connection with the language above mentioned, says: "Except those designated to be included in the general appropriation bill, and those, perhaps, for the support of which a special fund is provided by an annual tax levied for the particular purpose." This unquestionably refers to the State institutions supported by the fractional tax; and as this case is not expressly overruled by the case recently decided and first mentioned, but is quoted with approval, without comment upon the exception in favor of said institutions, I cannot advise you that it is not your duty to continue to draw warrants, upon proper requisitions made by the officers of said institutions, as you have heretofore done.

3. I should have answered your inquiries several days ago, but for the fact that the question relating to the insurance department was presented to the Court of Appeals in the case of Hurd *vs.* Carlile, and I hoped that by its decision I would be enabled to speak from indisputable authority. But said court has deemed the decision of said question unnecessary to the determination of the case, and has therefore declined to decide it, and my opinion, with such value and force as the authority below cited attaches to it, must be rendered.

4. In view of the strong and sweeping character of expression used in the Mute and Blind Institute case, I am not inclined to extend the exception in favor of the institutions supported by fractional annual tax one whit beyond the clear meaning and intent of the court by which it is made. Our Court of Appeals, in the Hurd case above mentioned, say that the insurance fund must "be taken to be the moneys of the State, properly in the custody of its principal head, and therefore as completely subject to his control as are other moneys coming into his custody."

5. This by no means decides the question under consideration, but it tends strongly to establish the proposition, that no distinction between the insurance fund and other funds is to be recognized by you, except that said fund is kept separate and used only for the payment of the

expenses of the department, until the surplus is turned into the general fund at the end of the year. The question, however, has been expressly decided by a sister State, the reasoning of which proceeds from a basis very similar to the above quotation from the Hurd case. The Supreme Court of Kansas, in the case of Martin *vs.* Francis, Treasurer, 13 Kan., 228, in applying the same provision of the Constitution of that State to an insurance law, which, in the particulars under consideration, is essentially the same as ours, say: "This [the section of the Constitution named] would seem to mean that no money that was ever rightfully in the State treasury shall be drawn therefrom, except in pursuance of an act of the Legislature specifically authorizing the same to be done;" and "the language of said section is broad enough to cover the insurance fund as well as every other fund." And the court further proceeds to enforce the constitutional prohibition, holding that no money can be paid out of the fund unless a specific appropriation has been made therefor by the legislative assembly having the proper control of the year's revenue from which such appropriation is made. This case is followed and its doctrine further expanded in the case of the State *ex rel. vs.* Stover, 47 Kan., 119. I think the doctrine is logically sound, and that it is only necessary to revert to the general principles stated in the Institute for the Mute and Blind *vs.* Henderson, above quoted, to perceive that our Supreme Court would decide the question in the same way if it were properly before it.

6. There being no appropriation from the insurance fund for the insurance department by the last General Assembly, it is my opinion that you are not authorized by law to approve any warrant, nor allow any claim presented to you for approval or allowance, by said department.

7. It is hardly necessary to add, that nothing above stated is intended to apply to those officers whose salaries are fixed by the Constitution, nor to the legislative, executive, or judicial departments.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

The Treasurer is referred to the next preceding opinion for answers to his questions.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, November 30, 1892.

HON. JAMES N. CARLILE,
State Treasurer.

DEAR SIR—You refer to me for advice as to the legality of a warrant of the State Auditor, against the insurance fund, drawn in favor of T. F. Simmons and John W. Inman, for two thousand dollars, for extra clerical work, and also a warrant for five hundred dollars, against the same fund, in favor of M. B. Carpenter, for legal services in the case of N. S. Hurd *vs.* J. N. Carlile. I hand you herewith a copy of an opinion to-day handed to the State Auditor, from which, I think, you can easily infer the answers to your questions.

Very respectfully,
JOS. H. MAUPIN,
Attorney General.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 12, 1891.

HON. LESTER BODINE,
Labor Commissioner.

DEAR SIR—You ask me whether or not an act passed by the Eighth General Assembly, entitled "An act to regulate the business of employment agents, and repealing other acts," is obnoxious to Section 21 Article V. of our State Constitution, in that said title fails to sufficiently state the subject and indicate the purpose of the act.

A similar question was decided by our Supreme Court in Golden Canal Company *vs.* Bright, 8 Colo., 144. In that case, it is held that a title expressed in the words, "An act to regulate the use of water for irrigation," would be sufficient to cover the fixing of maximum rates, provided for therein, by the board of county commissioners.

In Atkinson *vs.* Duffy, 16 Minn., 45, the words, "An act to regulate the foreclosure of real estate," constituting the title of an act, were, under an equivalent constitutional provision, held to be a sufficient statement of the subject in the title to include a provision in one section of the act that a mortgagor might waive his right of redemption. The word "regulate" is of such legal signification that the power to regulate commerce is defined to be the power to

prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted to determine when it shall be free and when subjected to duties or other exactions. (114 U. S., 203.) The power to regulate the use of the streets of a city implies the power to prohibit their use under proper circumstances (142 Mass., 203). To regulate by law is, therefore, to prescribe by law the rule by which a thing may be done; and to regulate a business or trade by law is to prescribe, by an act of the Legislature, a rule by which such business or trade may be conducted.

As above illustrated, the meaning of the term is sufficiently comprehensive to include prohibition of such trade on certain conditions, and to provide penalties for violation of the rules prescribed. The closest scrutiny of the act under consideration will fail to discover therein more than provisions that license shall or shall not issue, upon certain conditions, to persons who desire to engage in the business named, the punishment of persons who engage in the same without a license, and requiring cities and towns to pass ordinances to make the said act operative; provisions regulating the charges made for services rendered by persons engaging in said business; and other provisions relating to the conduct of such business, which, I think, are entirely germane to the subject set forth in the title of the act.

There is no necessity for said title to be more specific. "It is sufficient if the title of an act fairly give notice of its objects, so as reasonably to lead to an inquiry into the body of the bill." (77 Pa. St., 77 and 429.)

The title need not index details of the act, nor give a synopsis of the means by which the object of the statute is to be effectuated by the provisions of the act. (50 N. Y., 504; 8 N. Y., 241; 13 Mich., 494; 8 Louisana, 82, 11 Ld., 482.)

It is almost unnecessary to state my conclusion, that the title of the act first mentioned states its subject with sufficient comprehensiveness to include all its provisions and to make it operative in all its details.

Very respectfully,

JOS. H. MAUPIN,
Attorney General.

INDEX.

INDEX.